Central Law Journal.

ST. LOUIS, MO., JUNE 10, 1904.

EVADING FEDERAL JURISDICTION IN SUITS AGAINST MASTER FOR NEGLIGENCE OF SERVANT, BY MAKING THE LATTER A PARTY DEFENDANT.

It is sometimes advisable in suing a foreign corporation for injuries occasioned by the negligence of its servants, to avoid the possibility of removal of the cause to the federal court. This end is usually attained by bringing a joint action against the master and the servant whose negligence caused the injury, and then requesting an instruction that if the proof fails to show joint and concurrent negligence on the part of all the defendants, and yet shows negligence on the part of one or more of them, resulting in injury to plaintiff, as the sole and proximate cause thereof, the jury shall find a verdict against such defendant or defendants as the proof might show were guilty of such negligence.

This scheme of evasion, well known in practice, has been formally approved by the United States Supreme Court in the recent case of Southern Railway Co. v. Carson, 24 Sup. Ct. Rep. 609. In that case an action was brought in the state courts of South Carolina against the Southern Railway Company, a Virginia corporation, and two of its employees, citizens of South Carolina, for injuries occasioned by the latter's negligence. Under an instruction similar to the one mentioned at the close of the preceding paragraph a verdict and judgment was obtained against the Southern Railway Company alone. From the decision of the South Carolina Supreme Court, affirming this judgment, the defendant company presented a writ of error to the United States Supreme Court, contending that a verdict could not be rendered against the company alone, because if it had been sued alone, it would have had the right of removal. The railway company also excepted to the refusal of the court to give several instructions asked on its behalf, to the effect that, as by the allegation of a joint and concurrent tort, the company had been deprived of the right to remove the cause, joint and concurrent tort must be made out against the company and at least one of the other defendants; that to allow plaintiff to recover without proof of joint and concurrent tort would deprive the company of the right of removal guaranteed by the constitution and laws; and of its property without due process of law, in contravention of the fourteenth amendment, in that the company would be deprived of the right of reimbursement which would otherwise exist.

In denying the soundness of the defendant company's contentions, the court speaking through Mr. Chief Justice Fuller, said: "The right of removal depends on the act of congress, and the company not only, on the face of the pleadings, did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray in Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264, 'That an action of tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a state court, against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers, and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, "a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." The view thus expressed was reiterated in Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. Ed. 121, 21 Sup. Ct. Rep. 67, where the sebject was much considered, and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. Schumpert v. Southern R. Co., 65 S. Car. 332, 95 Am. St. Rep. 802, 43 S. E. Rep. 813. In that case it was held that under the the state code of civil procedure, in ac-

tions *ex delicto*, acts of negligence and wilful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant, committed within the scope of his employment, and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution was without merit, as the rule was, as laid down by Mr. Cooley (Torts. page 145), that: 'As between the company and its servants the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see Gardner v. Southern R. Co., 65 S. Car. 341, 43 S. E. Rep. 816. In Rucker v. Smoke, 37 S. Car. 380, 34 Am. St. Rep. 758, 16 S. E. Rep. 40, and Skipper v. Clifton Mfg. Co., 58 S. Car. 143, and 36 S. E. Rep. 509, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the state deprived the company of its property by the rulings of the supreme court calls for no remark."

NOTES ON IMPORTANT DECISIONS.

DIVORCE—REFUSING REQUEST FOR SEXUAL INTERCOURSE AS MARITAL CRUELTY. — A question of law on which, happily, there have been few authoritative decisions, have just come up for decision in the recent case of Varner v. Varner (Tex. Civ. App.), 80 S. W. Rep. 386. The question in that case was whether the denial of sexual intercourse constituted such cruelty as would constitute a sufficient ground for divorce. The court answered the question thus propounded in the negative, holding that the habitual refusal of a wife to accede to her husband's request for sexual intercourse is not cruel treatment of "such a nature as to render their living together insupportable," within the meaning of the divorce statute, where the husband is old, his virility diminished, and amorous desires feeble.

It is stated in the American & English Encyc. of Law (2d Ed.), vol. 9, p. 793, that "the persistent and unjustifiable refusal of marital rights may constitute cruelty, if sufficient to injure the health; but in no case has such injury been established. The refusal of either party to occupy the same bed is not cruelty under any definition of that term." This same question is discussed in 53 CENT. L. J. 41, in which the writer arrives at about the same result.

The court in the principal case, while recognizing the general rule seems to find a convincing basis of distinction in the fact that the plaintiff was an old man in whom the fires of passion had long since cooled. The court said: "But, if it be conceded that a case might be presented in which refusal to grant sexual intercourse would constitute such cruel treatment as would authorize a divorce under our statute, we do not think the record before us discloses such a case. In our opinion, the effect that such refusal would have upon a husband would depend in a large degree upon his physical condition, as well as upon the condition of the wife. The finding of the court that the defendant refused to accede to the plaintiff's requests carries with it the inference that the plaintiff solicited sexual intercourse, and the fact that he made such solicitations is all there is in the record indicating the plaintiff's physical condition. The rule is that in the absence of a statement of facts, or a finding of the court or jury to the contrary, it will be presumed that proof was made of all facts necessary to sustain the judgment. So in this case it may have been shown concerning the plaintiff that

'The way of his life
Has fallen into the sear, the yellow leaf.'

Old age and infirmity may be upon him; his virility may be greatly diminished; his amorous desires may be few and feeble, and the failure to have them gratified a matter of no great importance. And if such be his condition, whatever might be held as to a husband differently situated, we are of opinion that the trial court did not err in holding in this case that the wife's conduct, though wrongful, was not such an excess, cruel treatment, or outrage as to render their living together insupportable."

DOWER—DOWER IN MORTGAGED LAND REDEEMED AND SOLD BY EXECUTOR FOR PAYMENT OF DEBTS.—By express statute in England, and by statutory enactment or judicial decision in most American jurisdictions, dower is allowed in an equity of redemption. Another common statute, enacted for the benefit of creditors, allows the court to order the executor to sell the testator's realty, if necessary, for the payment of his debts. By the weight of American authority, in some states, regulated by statute, the mortgagee must realize first on his security, and then prove against the personal estate only for the excess of the mortgage debt over the value of the security. See Woerner, Administration (2d Ed.), § 408. Consistently with this rule of fairness to the general creditors, it has been held that the widow, having joined with her husband in the mortgage, cannot require the executor to exonerate the land out of the personalty. Hewitt v. Cox, 55 Ark. 225. For the same reason, moreover, an order of the court allowing the executor to sell the testator's realty does not allow him to discharge the mortgage and to sell the unincumbered land. Thus, on the settlement of his accounts, he is not entitled

to a credit for the amount so paid in discharge of the incumbrance. Pryor v. Davis, 109 Ala. 117. Similarly, the executor cannot maintain a bill to remove a cloud on the testator's title, inasmuch as his right is confined to the sale of the exact estate which the testator had. Phelps v. Funkhouser, 39 Ill. 401. If, now, the executor redeems, the legal title vests, by process of law, in the heirs and the widow. The purchaser, therefore, gets nothing, since the equity of redemption has disappeared and the legal title is in the heirs and the widow. What rights in equity the disappointed purchaser may have is a difficult question. One solution has been the following: The mortgage has been discharged by the officious act of the executor, and obviously there is no reason why the heirs should take the unincumbered land to the exclusion of the widow. As against the purchaser, also, who took no legal title at the executor's sale, there seems no reason for denying the widow's right to dower in the land. The conclusion of this reasoning is to give the widow dower in the land, because no other claimant shows a better right. Hastings v. Stevens, 29 N. H. 564. Such was the decision reached in a recent case. Casteel v. Potter, (Mo.), 75 S. W. Rep. 597.

This result, it is submitted, is undeserved as regards the widow, and unjust to the purchaser whose purchase money went to discharge the incumbrance and to satisfy the testator's debts. The purchaser paid his money in the belief that he was getting a clear title. The legal title, however, could not be passed under an order of the court to sell merely the testator's realty, as that consisted only of an equity of redemption. The equity of redemption, moreover, which the executor could have sold subject to the widow's dower, was extinguished by the redemption and could not pass to the purchaser. The purchaser, it would seem, took nothing by the sale. But since the purchase money has been applied to the payment of the incumbrance and the debts of the testator, the purchaser should not be remediless. It has been held that the purchaser, as against the enriched estate, would be subrogated to the rights of the satisfied incumbrancer and creditors, and could exercise their right to demand that the land be sold to reimburse him. Blodgett v. Hitt, 29 Wis. 169. The basis of the purchaser's right of subrogation is the satisfaction of the incumbrancer and the creditors out of the purchase money, which unjustly enriched the estate. A precisely similar case of unjust enrichment occurs when, without contribution, the widow gets dower in the unincumbered land; and the reasons for subrogation against the widow seem quite as strong. By this rule of subrogation, the mortgage, so to say, revives in equity, and the purchaser gets the mortgagee's right to keep the legal title till the amount of the incumbrance is reimbursed him, together with the right which the satisfied creditors had to have the equity of redemption sold for their benefit. It is unfortunate that the authority of an earlier Missouri decision (Jones v. Bragg, 33 Mo. 337), bound the court to deny a rule which combines substantial justice and sound principle —*Harvard Law Review.*

ACTS IN EMERGENCIES AS CONSTITUTING CONTRIBUTORY NEGLIGENCE.

The law is pervaded with a reasonableness that manifests itself in its every branch. In the law the most conspicuous and oft recurring words are "reason" and "reasonableness;" and every lawyer is familiar with the statement of Coke's, that reason is the life of the law; that it is nothing else but reason. So in determining the rights of parties in that very large and growing class of actions for personal injuries, the standard for determining the negligence or contributory negligence of the parties is that of the probable action of a man of reasonable prudence under the circumstances of the particular case. And so, applying the rule to the subject in hand, where one is confronted with an unexpected peril, portending personal insecurity, his conduct is to be characterized by the peculiar situation in which he finds himself. The rule, as it is commonly stated, is that where, by the negligence of another, one is at once placed in a situation of great peril, it is not contributory negligence upon one's part if in attempting to avoid such threatened danger one does an act, also dangerous and hazardous, from which injury results, if the course one pursues is such as a person of reasonable or ordinary prudence might have pursued under all the circumstances of the particular situation.[1]

In an action for a negligent injury it is no defense that the negligence of a third person contributed to cause the plaintiff's injury, if the defendant's negligence was an efficient cause. So where the negligence of a third person and of the defendant are concurring causes contributing to a position of sudden

[1] Wilson v. Denver, etc., Co., 26 Minn. 278, 3 N. W Rep. 333; Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597; St. Joseph, etc., R. Co. v. Hedge, 44 Neb. 448, 62 N. W. Rep. 887; Twomley v. Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Walters v. Denver, etc., Co., 54 Pac. Rep. 960.

danger to the plaintiff, the latter's ill-advised action under the spur of necessity occasioned thereby may be sufficient to fix the liability of the defendant, and does not amount to contributory negligence on the plaintiff's part so as to defeat his action.[2]

Furthermore, it is not even necessary that the defendant's negligence should in any way conduce to the confused judgment of the plaintiff, or the injured person, whether as the sole cause, or as a cause concurring with the acts of a third person or an independent agency. If the injured person was confused or bewildered by any cause, not the result of his own negligence, for negligent injury to him by a defendant, while so situated, there may be a recovery. From the viewpoint of the injured person, his action under the circumstances being that of one exercising ordinary prudence, it can make no difference that another than the defendant produced that situation, if the injury actually inflicted was the result of the defendant's negligence.[3]

Thus in the case of Chattanooga Electric Ry. Co. v. Cooper, *supra*, the plaintiff's intestate, it appeared, a very old man, in crossing one of the streets of Chattanooga over which the defendant operated its cars by electric power, suddenly found himself in a position of sudden peril from a rapidly approaching automobile, and in attempting to escape, in a moment of alarm and excitement, inadvertently ran upon one of the defendant's tracks and was killed by a passing car. The motorman in charge of the car was not looking in front of his car, but was directing his attention to the automobile, but for which the intestate would not have been injured. It was argued, on behalf of the defendant, that, in determining whether the intestate was guilty of contributory negligence, the fright produced by the negligence of the automobile driver alone was not to be considered; that is, that the rule we have stated does not apply where the danger is brought about by a third person, or an independent agency. The court said: "It is well settled by all the authorities that a plaintiff put in a place of sudden peril by the negligent act of a defendant, who, losing self-possession, takes a wrong step and is injured, will not have such step imputed to him as contributory negligence. * * * But it is a mistake to assume," continued the court, "as is done by the plaintiff in error, that the application of this rule is restricted to cases where the peril producing the confusion of judgment, and the consuquent false effort to escape, is the negligent act of the party creating the peril." The court then quotes with approval the following from Elliott on Railroads: "The rule goes further than to exonerate the traveler where the peril is caused by the railroad company; for if, without fault himself, the traveler is placed in a position of sudden peril by a third person, or by some accident—as for instance, by horses running away—he may be absolved from exercising that degree of care required of one in ordinary circumstances."[4]

Test of Contributory Negligence in Such Cases.—Whether a party in such a case was guilty of contributory negligence is to be determined wholly without reference to whether a course could by some possibility have been pursued without danger of personal injury.[5]

One, finding himself suddenly confronted with a perilous situation that another has negligently brought about, may have numerous means apparently of escape that in confusion present themselves to him; and he may, and usually will, by the occasioned fright and bewilderment, not choose the course safest to pursue. Indeed, he may pursue the course of greatest danger, or throw himself into the very danger that he seeks to avoid. But this alone does not characterize his conduct as contributorily negligent as a matter of law. The course pursued must not only

[2] Dver v. Railway Co., 71 N. Y. 228; Akers v. Mayor, etc., 14 Misc. Rep. 524, 35 N. Y. Supp. 1099.

[3] Chattanooga Electric R. Co. v. Cooper (Tenn.), 70 S. W. Rep. 72, not yet officially published; Marble Co. v. Black, 89 Tenn. 124, 14 S. W. Rep. 479; Railroad Co. v. Gurley, 12 Lea, 46; 3 Elliott on Railroads, sec. 1173.

[4] 3 Elliott on Railroads, sec. 1173.

[5] Canton v. Simpson, 38 N. Y. Supp. 13, 2 App. Div. 561; Southwestern R. Co. v. Paulk, 24 Ga. 356; South Covington, etc., R. Co. v. Ware, 84 Ky. 207, 1 S. W. Rep. 493; Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Bishop v. Railway Co., 92 Wis. 145; Wynn v. Railway Co., 133 N. Y. 575, 30 N. E. Rep. 721; Manzer v. Chippewa, etc., R. Co., 108 Wis. 319, 84 N. W. Rep. 123; McPeak v. Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. Rep. 470; Heach v. Glens Falls, etc., R. Co., 36 N. Y. Supp. 22, 90 Hun, 560; Ephland v. Mo. Pac. R. Co., 57 Mo. App. 147; St. Joseph, etc., R. Co. v. Hedge, 44 Neb. 448, 62 N. W. Rep. 887; Bischof v. Railway Co., 121 Mo. 216; Budd v. Carriage Co., 25 Oreg. 314; Union Pac. R. Co. v. Kelly, 4 Colo. App. 325.

have been the most unsafe one, but it must so have appeared to one of reasonable prudence in his situation.[6]

In Nicholsburg v. Second Ave. Ry. Co.,[7] *Bischoff, J., speaking for the court, on this* point said: "It might be assumed that by taking a different course the plaintiff could have avoided the injury, but this sudden call upon him to adopt one of two courses in the face of danger was caused by the defendant's *negligence in creating the dangerous situa*tion, and we are not to say that a recovery was unauthorized because the course chosen was not shown to be obviously the wiser and safer of the two." The rule was thus more fully stated by the Minnesota court in a recent case in an action by a passenger against a carrier: "The test of contributory negligence," said the court, "where the passenger is required, in endeavoring to escape the peril in which the negligence of the carrier has placed him, is, was the attempt an unreasonable, rash or precipitate one, or was it an act which a person of reasonable prudence might do? This is not determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made. To permit that to determine it," continued the court, "would be in effect to require of the passenger to judge with absolute certainty the extent to which the danger would go if he made no move, and with like certainty the consequences of the attempt to escape."[8]

It is not enough that one makes merely an error of judgment in his hasty selection of a means of escape from an imminent peril with which he is confronted through the negligence of another.[9]

As we have seen, the law is not so unreasonable in its requirements, for so to hold would be the equivalent of saying to wrongdoers, "you by your own negligence and wrongdoing may imperil one as you like, and require one in such a situation of your own making utterly to suppress the natural instinct of self-preservation, and remain passive to receive *an injury that seems to be avoidable by* immediate action."[10]

One in such a situation cannot be expected or required to calculate chances, and may do things that, having been done, may seem to have been indiscreet, and may in fact have *helped to produce the injury.*[11]

Yet due weight is always to be given to the fact that a reasonable, rational being may, by a sudden and wholly unexpected situation of peril, be for the moment deprived of his ordinary reason, and in his attempt to escape therefrom place himself in a situation of infinitely greater peril. That a person may so act must have been expected by the one that negligently occasions such a perilous situation; and the injury resulting from an act of one's in such an emergency is therefore the proximate result thereof. And it can make no difference, it has been held, that the plaintiff in such a case is nervous, and because of the nervous condition was frightened by the negligence of the defendant in leaping into danger, as such persons are likely to be subjected to such peril, and should be expected.[12]

The Character and Imminency of the Danger.—The apprehension of peril from the point of view of the injured person must, however, have been reasonable; and the appearance of danger negligently caused or permitted to exist, must have appeared so imminent as to leave no time, or to afford no opportunity, for deliberation. It is not necessary that the danger should have been actual, and it is therefore no defense that, had the plaintiff not changed his position or assumed to act upon his own judgment, no injury would have resulted to him.[13]

[6] Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N. W. Rep. 744; Chicago, etc., R. Co. v. Corson, 101 Ill. App. 115, affirmed in 64 N. E. Rep. 739; Thies v. Thomas, 77 N. Y. Supp. 276; Pennsylvania R. Co. v. Snyder, 45 N. E. Rep. 559, 55 Ohio St. 342.

[7] 32 N. Y. Supp. 130, 11 Misc. Rep. 432.

[8] Gilfillan, J., in Wilson v. Northern Pac. R. Co., 26 Minn. 278, 3 N. W. Rep. 333.

[9] Thies v. Thomas, 77 N. Y. Supp. 276; Richmond, etc., R. Co. v. Hudgins, 41 S. E. Rep. 736; Hefferman v. Alfred Barber's Sons, 55 N. Y. Supp. 418, 36 App. Div. 163.

[10] Brown v. New York Cent. R. Co., 32 N. Y. Supp. 597, 88 Am. Dec. 353; St. Louis, etc., R. Co. v. Murray, 55 Ark. 248, 18 S. W. Rep. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787; Louisville, etc., R. Co. v. Lucas, 6 L. R. A. 195, and note.

[11] Ladd v. Foster, 31 Fed. Rep. 827; Walters v. Denver, etc., Co., 54 Pac. Rep. 960; Sweeney v. Kansas City, etc., R. Co., 150 Mo. 385, 51 S. W. Rep. 682; Lawrence v. Green, 70 Cal. 417, 11 Pac. Rep. 750, 59 Am. Rep. 428.

[12] Wanzer v. Chippewa, etc., R. Co., 108 Wis. 319, 84 N. W. Rep. 423; Oliver v. Town of LaValle, 36 Wis. 597.

[13] Chitty v. St. Louis, etc., R. Co., 148 Mo. 64, 49 S.

If the danger under the circumstances would have seemed to a person of ordinary prudence to be at hand, and to necessitate an attempt to escape therefrom, this is sufficient to excuse one from the charge of contributory negligence. In Momence Stone Co. v. Groves,[14] the plaintiff was a laborer in the defendant's quarry. He was standing at the side of an incline track, over which cars containing stone were hauled, near the junction of a curve and tangent, with a high wall back of him, when a hook attached to the car that was being hauled up the incline gave way. The plaintiff was really in a position of safety, but seemingly of danger and, thinking that the car would leave the track where he was standing, attempted to cross the track in front of the car and was injured. In holding that the plaintiff could not be held guilty of contributory negligence as a matter of law under such circumstances, the court said: "As it turned out, if he had stayed where he was, the car would not have struck him; but he is to be judged by all the surroundings in view of the suddenness of the danger, and the probabilities as they would appear to one in his situation. Under all the circumstances, with the sudden appearance of danger, and the want of time for reason and reflection, the evidence raised a fair question for the jury in the first instance, which the court would not be authorized to take from them."

So where a miner, frightened by the cry of fire in his mine, attempted to escape from the mine, and was killed by falling through a shaft, the fire, however, in due time being extinguished, without injury to those who kept their places;[15] and where one, believing that a horse car on which she was a passenger would collide with a locomotive at a crossing of the tracks, the passengers on the car giving expression to feelings of fear, jumped therefrom and was injured, the cars, however, not colliding;[16] it was held that, in each case, such persons were justified in pursuing the course they pursued, and that their conduct under the circumstances did not amount to contributory negligence. But the rules stated do not extend to permit one with impunity heedlessly to attempt an escape from every seeming danger howsoever trivial. One may be charged with contributory negligence even if there is some neglect upon the part of the defendant occasioning the appearance of danger.[17]

In a recent case it was said: "It is urged that, when one is frightened by something resulting from the neglect of the carrier, he cannot be charged with contributory neglect to any extent. He, however, must act upon a reasonable apprehension of peril. His conduct must conform," said the court, "to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it."[18] So where a passenger on a snow-bound train mistakes a snow plow approaching from behind on a second and parallel track to be a train approaching on the track on which his train is standing and, at a signal whistle, intended for the train men only, leaps in front of the snow plow and is injured, the railroad company cannot be held liable for his injury.[19]

Degree of Expected Injury.—It is not necessary, to excuse one from the charge of contributory negligence in attempting to escape from an apparent danger, that he believed himself in imminent peril of his life. The reason is the same in either case, and it is held to be sufficient, therefore, that one be-

W. Rep. 868; Leslie v. Railway Co., 88 Mo. 55; South Covington, etc., R. Co. v. Ware, 84 Ky. 267, 1 S. W. Rep. 493; Haff v. Minneapolis, etc., R. Co., 14 Fed. Rep. 558; Mark v. St. Paul, etc., R. Co., 32 Minn. 208, 16 N. W. Rep. 367; Kermon v. Gilmer, 2 Pac. Rep. 21; Washington, etc., R. Co. v. Hickey, 5 App. D. C. 436; Houston, etc., R. Co. v. Norris, 41 S. W. Rep. 708.

[14] 197 Ill. 88, 64 N. E. Rep. 335, affirming 100 Ill. 98.

[15] Coal Co. v. Healer, 84 Ill. 129.

[16] Klieber v. Peoples' Railway Co., 107 Mo. 240, 17 S. W. Rep. 246, 14 L. R. A. 613.

[17] Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N. W. Rep. 744; McPeak v. Missouri Pac. R. Co., 30 S. W. Rep. 173; Railway Co. v. Felton, 125 Ill. 458, 17 N. E. Rep. 765; Railway Co. v. Wallen, 65 Tex. 567; Jones v. Boyce, 1 Starkie, 493; Mark v. St. Paul, etc., R. Co., 32 Minn. 208, 16 N. W. Rep. 367; Collins v. Davidson, 19 Fed. Rep. 83; Baltimore, etc., R. Co. v. Leapley, 65 Md. 571, 4 Atl. Rep. 891; Frink v. Potter, 27 Ill. 406; Lowery v. Manhattan, etc., R. Co., 99 N.Y. 158, 1 N. E. Rep. 608; Railroad Co. v. Morris, 31 Grattan, 200.

[18] South Covington, etc., R. Co. v. Ware, 1 S. W. Rep. 493.

[19] Chicago, etc., R. Co. v. Felton, 125 Ill. 458, 17 N. E. Rep. 765.

lieves himself in danger of serious, physical injury. In discussing an instruction that announced a different rule, the Court of Appeals of Texas said, Fisher, C. J., speaking for the court: "The principal objection to this charge is that it restricts the right of the passenger to leap from the car only when his life is in imminent peril. It is not only the peril to life that justifies the passenger in leaping, but the right exists to escape serious bodily injury. He cannot justify his conduct," continued the court, "in encountering a danger that the appearance of things reasonably indicate is greater than the danger he is seeking to avoid. But the danger he is seeking to avoid may reasonably indicate that, if encountered, it would result in serious bodily injury, something less than death. In such circumstances he would have the right to avoid it, provided he did not encounter a greater danger in doing so than the facts and circumstances reasonably indicated existed."[20]

Contributory Negligence Usually a Question of Fact.—The question whether the appearance of danger is sufficient to warrant the plaintiff in assuming a certain risk in attempting to escape injury, or whether he was negligent in adopting a particular course, is one of fact for the determination of the jury.[21]

Thus, it is a question of fact for the jury whether an insult received by the plaintiff, a passenger on a street car, from an unknown person, who laid hold of her on a former occasion when driven into the car barn, was sufficient to justify her belief that she was avoiding an actual impending danger, and to justify her in leaving the car when in motion after the driver seemed not to heed her request to stop the car to permit her to alight therefrom;[22] nor, it has been held, can it be said as a matter of law, that an express messenger was negligent because, his car becoming detached from the engine drawing the train and starting down grade, he failed to jump therefrom when he learned of the situation before his car had exceeded a speed of four or five miles an hour.[23]

Perilous Situation Negligently Assumed.—The rule, however, that one in a situation of peril is not liable for an error of judgment in his attempt to avoid injury is subject to the qualification that he must not negligently have placed himself in such a situation or voluntarily have assumed it.[24] This is illustrated by the case of Robinson v. Manhattan Railroad Co., *supra*. There the plaintiff's intestate, while the defendant's train was moving out of the station, intending to take passage thereon, boarded the same and clung to the platform until he was struck by a railing beside the track and, falling, was killed. The court, holding that the plaintiff could not recover, said: "Assuming that the intestate was 'properly upon the train,' the appellant argues that he was 'placed in imminent peril by the defendant's act,' and so was not responsible for his misjudgment in continuing on the platform. But by the decision of the court of appeals the intestate was wrongfully on the train, that is, was there by an act of negligence which made him responsible for the consequences of the position. The rule that a person in a position of danger is not responsible for a mistake in getting out of it is subject to the qualification that he must have got into the danger without fault or negligence of his own."

Attempts to Rescue Others in Perilous Situations.—It is not negligence *per se* for one to risk his life or to place himself in a situation of great danger in an affort to save another from injury or death from a sudden peril as a result of the negligence of another. If the conduct of a person in such a case is that of a person of ordinary prudence; or differently stated, if the rescuer does not act rashly, and unnecessarily expose himself to danger, his injury in attempting the rescue is to be attributed to the person whose negligence ex-

[20] LaPrelle v. Fordyce, 4 Tex. Civ. App. 391, 23 S. W. Rep. 453.

[21] McLaughlin v. Armfield, 58 Hun, 376, 12 N. Y. Supp. 164; Nebraska Tel. Co. v. Jones, 59 Neb. 64, 82 N. W. Rep. 197; Chicago, etc., R. Co. v. Kinnare, 76 Ill. App. 394; Ashton v. Detroit City R. Co., 78 Mich. 587, 44 N. W. Rep. 141; Union Pac. R. Co. v. Kelly, 4 Colo. App. 325, 35 Pac. Rep. 923.

[22] Ashton v. Detroit City R. Co., 78 Mich. 587, 44 N. W. Rep. 141.

[23] Union Pac. R. Co. v. Kelly, 4 Colo. App. 325, 35 Pac. Rep. 923.

[24] Robinson v. Manhattan R. Co., 25 N. Y. Supp. 91, 5 Misc. Rep. 209; Pennsylvania R. Co. v. Aiken, 142 Pa. St. 27, 18 Atl. Rep. 619; Dummer v. Milwaukee, etc., Co., 108 Wis. 589, 84 N. W. Rep. 853; Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. Rep. 464; Railroad Co. v. Werner, 89 Pa. St. 59; Johnson v. Railroad Co., 70 Pa. St. 357.

posed to danger the person who required assistance.[25]

The acts of the rescuer are to be considered in the light of all the circumstances that impelled him to their commission. Merely that the risk assumed was shown by the result to have been greater than in the excitement of the moment he had contemplated will not be sufficient to found the imputation of negligence upon; and no hard and fast rule can be stated as governing this class of cases. As was stated by the Ohio court[26] in a comparatively recent case, an action by a father against a railway company for an injury received by him while rescuing his child of tender years, who had fallen in front of an advancing train: "There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even greater danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority."

Consistently with the foregoing, it has been held that a mother is not guilty of contributory negligence in attempting to extricate her child from a live electric wire, whether she knew the consequences of her action or not;[27] so where a locomotive engineer, knowing that a wreck of his train was imminent, refused to leave his post and went to his death in consequence thereof, his conduct did not as a matter of law, amount to contributory negligence so as to defeat a recovery by his personal representatives for his death;[28] nor, it has been held, is a father guilty of contributory negligence who, leaping into a canal to rescue his child that has fallen therein through a defective bridge, is in such attempt drowned.

There are numerous other phases of this question, of both interest and importance, which would not be out of place in this discussion, but space will not here permit us to discuss them.

GLENDA BURKE SLAYMAKER.

Anderson, Indiana.

[25] Eckert v. Long Island R. Co., 43 N. Y. 503, 3 Am. Rep. 271; Donahoe v. Wabash, etc. R. Co., 83 Mo. 563, 53 Am. Rep. 594; Cottrill v. Chicago, etc., R. Co., 47 Wis. 634, 32 Am. Rep. 796; Pennsylvania R. Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; Pennsylvania R. Co. v. Lagendorf, 48 Ohio St. 316, 13 L. R. A. 190; Gibney v. State, 137 N. Y. 1, 19 L. R. A. 365; Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692; Walters v. Denver, etc., Co., 54 Pac. Rep. 960; Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14, 4 Am. Rep. 181; Sann v. H. W. Johns Mnfg. Co., 44 N. Y. Supp. 641.

[26] Pennsylvania Co. v. Lagendorf, 48 Ohio St. 326, 13 L. R. A. 190.

[27] Walters v. Denver Electric Co., 54 Pac. Rep. 960.

[28] Pennsylvania Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173.

REMOVAL OF CAUSES—REQUISITES OF PETITION IN STATE COURT.

ILLINOIS CENTRAL R. CO. v. JONES.

Court of Appeals of Kentucky, May 6, 1904.

Act of congress provides that a party desiring to remove a cause to the federal court shall file a petition for removal in the state court, with a sufficient bond, and that the state court shall then proceed no further. Held, that on a petition for removal it is the duty of the state court to proceed no further than to satisfy itself as to the sufficiency of the bond, where the petition, or the petition and the record together, show a *prima facie* right to removal, but such showing is a condition of the federal court's jurisdiction.

Where the petition filed in the state court does not show *prima facie* that there is a removal controversy, the jurisdiction of the federal court cannnot be conferred by consent or by any appearance, or even by a trial therein.

O'REAR, J.: On a former appeal (66 S. W. Rep. 609) we held that the petition by appellant, The Illinois Central Railroad Company, for the removal of this cause into the United States Circuit Court, did not show, nor did the whole record show on its face, a separable controversy, and therefore that the lower court did not err in refusing to order the removal. After the motion for removal had been overruled in the state court, appellant filed a transcript of the record in the United States Circuit Court for the district of

Kentucky, at Paducah. Appellee appeared in that court and moved to remand the case. The order of the court overruling the motion to remand recited that it was upon evidence heard. What the evidence was, the record does not show. Time was given by the order in that court to appellee to file a bill of exceptions, and to the defendant to file its answer, and to the plaintiff (appellee) time thereafter in which to reply. At a subsequent term of that court, appellee appeared, and dismissed his petition, without prejudice. In the meantime the case in the state court was being proceeded with. Upon the return of the case from this court, appellant offered to file a supplemental answer alleging the filing of the transcript in the United States Circuit Court, and the various steps taken therein, including the dismissal of the petition without prejudice. The court refused to permit the amendment, or the exhibits, copies of the proceedings in the federal court, to be filed. The action is one of the grounds now urged for a reversal of the judgment.

Appellant contends that as there was but the one action, when it was removed into the United States Circuit Court by the filing of the transcript, and by the overruling in that court of the motion to remand, thereafter an appearance by the plaintiff (appellee) was a waiver of the question of jurisdiction over his person, if there was such question, and the subsequent dismissal of the action without prejudice was actually a dismissal of the identical action now being tried. On the other hand, appellee contends that unless the United States Circuit Court had jurisdiction of the subject-matter, to-wit, a controversy involving more than $2,000, wholly between citizens of different states, or was separable, so that when separated it would constitute such an action, jurisdiction could not be conferred upon that court by waiver or consent; that therefore all proceedings there were void.

Under the act of congress (secs. 2, 3, Act March 3, 1875, ch. 137; secs. 1-10, as amended, Act March 3, 1887, ch. 373, 24 Stat. 552; Act Aug. 13, 1888, ch. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), if the petition for removal be filed in the state court in due season, and be accompanied by sufficient bond and motion, and if the petition states facts showing, or if it and the record together then show a *prima facie* right to the removal by the petitioner, it is the duty of the state court to proceed no further than to satisfy itself as to the sufficiency of the bond. The proper practice then is for the other party, if dissatisfied, to controvert in the federal court the facts alleged in the petition for the removal, and have the case then remanded, if improperly removed. If the state court orders this removal upon an insufficient petition, the party aggrieved may also prosecute an appeal at once to the state appellate court to have the order reviewed.

In recent years the right of removal has been more frequently and stubbornly resisted, and, without doubt, artful subterfuges have been resorted to by pleaders to control the question of jurisdiction. When that question depends upon a fact properly made an issue, the ascertainment of such fact is necessarily within the sole jurisdiction of the United States courts, and their determination of jurisdictional facts is conclusive, binding alike upon the parties and state courts. If the facts properly alleged in the petition for removal of this case showed such a separable controversy between appellant railroad company, a citizen of Illinois, on the one side, and appellee, a citizen of Kentucky, on the other, which could and ought to be tried without regard to the presence of or right to have either of the other defendants joined in the suit, then the federal court had no jurisdiction of this case. But whether, upon the facts stated in the petition and record, there was presented a federal case, was within the jurisdiction of the state court to adjudge. Kansas City, etc., R. R. Co. v. Daughtry, 130 U. S. 298, 11 Sup. Ct. Rep. 306, 34 L. Ed. 963; McDonald v. Salem Capital Flourmill Co., 31 Fed. Rep. 577; Burlington, C. R. & N. Ry. Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. Rep. 1262, 30 L. Ed. 1159; Stone v. S. Car., 117 U. S. 430, 6 Sup. Ct. Rep. 799, 29 L. Ed. 962.

While the state courts cannot inquire whether the facts alleged in the petition for removal are true, yet, when the petition for removal and the record do not show a *prima facie* right to the removal, the state court may refuse to surrender the case, and will proceed to its trial. Filing a copy of the record in the federal court upon such an insufficient petition does not, in our opinion, give the latter court jurisdiction to try the question of jurisdictional facts. If both the state and federal courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusion result. To avoid these, the congress has wisely made the condition of the federal court's jurisdiction to depend upon the filing in the state court, in due time, of a petition, in which, according to the unbroken current of the decisions of the federal courts construing the act, all necessary facts to show *prima facie* a right in the petitioner for the removal must be set out, not as conclusions of law, or such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the state court for the removal is made. Crehore v. Ohio, etc., R. Co., 131 U. S. 240, 9 Sup. Ct. Rep. 692, 29 L. Ed. 144; Freeman v. Butler 39 Fed. Rep. 1 (opinion by Barr, District Judge); Seddon v. Virginia, T. & C. S. & I. Co., 36 Fed. Rep. 6, 1 L. R. A. 108; Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. Rep. 9, 33 L. Ed. 249; Smith v. Horton, 7 Fed. Rep. 270; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428; Weed Sewing Machine Co. v. Smith, 71 Ill. 204; Chester v. Chester, 7 Fed. Rep. 1; Burlington, etc., Ry. Co. v. Dunn, 122 U. S. 517, 7 Sup. Ct. Rep. 1262, 30 L. Ed. 1159; Railway Co. v. Ramsey, 22 Wall. 322, 22 L. Ed.

823; Grace v. American Central Ins. Co., 109 U. S. 278, 3 Sup. Ct. Rep. 207, 27 L. Ed. 932; Gold W. & W. Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. Rep. 1030, 30 L. Ed. 992; Removal Cases, 100 U. 457, 25 L. Ed. 593; Yulee v. Vose, 99 U. S. 539, 25 L. Ed. 355. The truthfulness of these facts may then, and not till then, be inquired into in the federal court. As the petition for the removal and the record in this case did not, in our opinion, state facts sufficient to confer jurisdiction upon the United States Circuit Court, that tribunal had not the right to inquire into their truthfulness, nor to hear evidence as to other facts not alleged in the record or the petition for removal, and, by adding such evidence to the insufficient allegations, find the needed jurisdictional facts. Applying these principles to this case, the United States Circuit Court never had jurisdiction of this action for any purpose. Nor can such jurisdiction be conferred by consent or appearance, or even a trial therein without objection on the merits of the case. Peper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. Rep. 287, 30 L. Ed. 435; Mexican National R. R. Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. Rep. 563, 39 L. Ed. 672; Southworth v. Reid, 36 Fed. Rep. 451; Kingsbury v. Kingsbury, 3 Biss. 60, Fed. Cas. No. 7,817; *Re* Hopkins, 18 Nat. Bank. Reg. 339, Fed. Cas. No. 6,686.

The recent case of Stephenson's Adm'r v. I. C. R. R. Co. (Ky.), 75 S. W. Rep. 260, seems to be in conflict with the conclusion now reached, and the reasons assigned therefor. The question of jurisdiction herein discussed was not considered or presented in that case. But in so far as it is in conflict with the principles of this opinion, it will no longer be regarded as authority.

It follows that the ruling of the trial court was correct, in refusing the amended or supplemental answer setting up the proceedings in the United States Circuit Court, as the matter thus attempted to be pleaded did not constitute a defense, and was wholly immaterial to the case.

For the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

NOTE.—*Removal of Cause to Federal Court by Consent.*—The court in the principal case has clearly stated the rule that the removal of a cause to the federal court cannot be effected by consent or appearance. It is, indeed, well settled that an action pending in a state court cannot be removed to the circuit court by written stipulation, where there is nothing in the latter or the record to show that, by reason of the subject-matter, or the character of the parties, the latter court can take cognizance of it. People's Bank v. Calhoun, 102 U. S. 256; Kingsbury v. Kingsbury, Fed. Cas. No. 7817 (3 Biss. 60).

Jurisdictional Averments in the Petition.—It is a rule well substantiated by authority that a cause is not removable unless the petition expressly sets forth the facts which confer jurisdiction on the federal court. Smith v. Horton, 7 Fed. Rep. 270; Woolridge v. McKenna, 8 Fed. Rep. 650; Lalor v. Dunning, 56 How. Pr. 209; Baltimore & Ohio R. R. v. Pittsburg, etc., R. R., 17 W. Va. 812. Moreover, these allegations must be positive and certain. Thus, the the allegation that the defendant is an alien, "as plaintiff is informed and verily believes" is insufficient. Wolff v. Archibald, 14 Fed. Rep. 369, 4 McCrary, 581.

But in an application for the removal of a cause of action to the federal court, the petition and accompanying affidavits are to be taken as part of the same instrument, so that it is error to deny the application because the proper showing has not been made, when it is contained in the affidavit. Bixby v. Blair, 56 Iowa, 416, 9 N. W. Rep. 318; Yulee v. Vose, 99 U. S. 539; Shattuck v. Insurance Co., 58 Fed. Rep. 609; Chambers v. McDougall, 42 Fed. Rep. 694; Hayes v. Todd, 34 Fla. 233, 15 So. Rep. 752. And this rule is enforced even where the ground of removal is erroneously alleged in the petition. Ruckman v. Ruckman, 1 Fed. Rep. 587. But, see, Mackaye v. Mallory, 6 Fed. Rep. 743, 19 Blatchf. 165; Sherman v. Windsor Mfg. Co., 11 Fed. Rep. 852; Goodsell v. Pine Land Co., 72 Miss. 580, 18 So. Rep. 452. But, in any event, a petition for removal of a cause to the federal court is properly refused where the facts on which the application was based were not made to appear from the record as a whole. Hyatt v. McBurney, 18 S. Car. 199.

An averment of residence in a petition for removal is not equivalent to an averment of citizenship, and will not support the jurisdiction of the federal court. Grace v. Insurance Co., 109 U. S. 278; Neel v. Pennsylvania Co., 157 U. S. 153, 15 Sup. Ct. Rep. 589; Grand Trunk R. R. v. Twitchell, 59 Fed. Rep. 727; Corp. v. Vermeley, 3 Johns. (N. Y.) 145; Brock v. Doyle, 18 Fla. 172; Clark Co. v. Figgins, 27 Va. 693; Easton v. Rucker, 24 Ky. 332; Cleveland, etc., R. R. v. Monaghan, 140 Ill. 474.

JETSAM AND FLOTSAM.

THE MICROSCOPE AND CAMERA IN THE DETECTION OF FORGERY.

The subject of this paper is one of great practical importance in the administration of justice; and, while not undertaking to treat the subject exhaustively, we shall endeavor to give some points which may be of value in subsequent cases.

The modes of committing forgery are various. Forgery may be committed in the following ways:

1. By alteration of the document in question, which may consist of (a) an erasure or erasures; (b) of additions to the instrument; (c) of both erasures and additions.

2. By the forgery of the entire writing or of the signature. This may be accomplished in several methods: (a) By tracing a fraudulent signature over a genuine signature by means of the pen or pencil. The writer has had one case where this was done by the use of carbon paper. (b) By copying or imitating the genuine signature otherwise than by tracing.

The methods of detecting frauds thus committed are various, according to the nature of the fraud:

1st. Composite photography has been proposed as a means of determining the authorship of a disputed document. While this method seems to be founded on correct scientific principles, yet in our opinion the cases in which it may be applied in practice will be very few, if any. In order to apply this method

for the identification of a writing whose authenticity is questioned, very much more material is required than is usually available in any case presented in court. As a rule, questions of authenticity arise principally with reference to disputed signatures, and under the rules of evidence applicable in England and in most of the states it is very difficult, if not impossible, to procure other similar signatures as a means of identification, and without a very considerable number of similar signatures this method cannot be adopted. Moreover, the difficulties of technique are such as to render it impracticable in the hands of an ordinary observer.

2nd. Another means of identifying the authorship of a document is that proposed by Prof. T. C. Mendenhall, and published, I believe, in Science some years since. This method consists in what may be styled "Curves of Literary Style," the co-ordinates of which, if I remember correctly, consist of the number of words and the number of syllables which they respectively contain. This method, although very interesting and probably of considerable scientific value in cases to which it is applicable is not, in the opinion of the writer, of any practical value in the ordinary administration of justice, as cases are presented for adjudication in court, for the reason that it requires vastly more material than is ever accessible in ordinary practice.

3rd. The ordinary method of identifying writing in use in courts of justice is that styled "Comparison of Hands." In this connection a brief review of the rules of law applicable to this case may not be inappropriate. By the English common law a witness is competent to testify respecting the genuineness of the disputed writing:

1. If he has seen the party alleged to have made the writing in question write: and it is sufficient for this purpose that the witness has seen him write but once, and then only his name.

2. The second mode of acquiring knowledge of the handwriting of another is by the receipt from such person of written communications purporting to be in his handwriting, either in the usual course of business or in reply to letters written by the witness, provided such communications have been acted upon as genuine by the parties, or adopted as such in the regular course of business.

3. Another method is by means of the comparison of the specimen in question with fairly selected undisputed specimens of the alleged handwriting. With respect to this third method there is considerable conflict of authority. By the English common law such comparison was permitted in two cases—(a) where the writings in question are of such antiquity that living witnesses cannot be had, and yet are not so old as to prove themselves. Here the course is to produce other documents, either admitted to be genuine or proved to have been respected, treated, and acted upon as such by the parties, and to call experts to compare them, and to testify their opinion concerning the genuineness of the instrument in question; (b) where other writings admitted to be genuine are already in the case.

Considerable diversity of practice at present prevails in England and in the various states of the Union; this diversity has been brought about partly by statutory enactment, and partly by decisions of the courts. Without undertaking to go into the details of the subject, we may state that in the state of Illinois the English rule is applied with some strictness, and excluding the case of ancient documents, the only case, as we understand it, in which a comparison of hands by experts is permitted is where other writing admitted or proved to be genuine are properly in evidence, and pertinent to the case. Brobston v. Cahill, 64 Ill. 356, in which the rule laid down in Jumpertz v. The People, 21 Ill. 408, is explained and qualified. See also in general 1 Greenleaf on Evidence, sec. 577 *et seq.*; Chambe rlayne's Best on Evidence, sec. 232 and note; Rogers on Expert Testimony, sec. 139, 140, *et seq.*

With reference to this third method by comparison of hands, two cases arise—first, where the material upon which the judgment is based consists of the disputed and genuine signatures; and, second, where the material at hand consist of a letter or letters, or other documents more voluminous. In the former case the judgment arrived at does not, of course, possess the same weight as where more material is at hand upon which to form a judgment; nevertheless, cases do arise in which the expert is warranted upon a comparison of the signatures in expressing a very clear opinion that the signatures were or were not made by the same person.

As to the method of arriving at an opinion upon the comparison of one or more other signatures, the cases are so diverse that no general rule can be laid down. Each case must be decided upon its own particular facts

In the second case, not unfrequently a conclusion can be arrived at having a high degree of probability, amounting almost to a moral certainty. In arriving at a conclusion, many things are to be considered—not only is the form of the letters important, but their manner of combination to form words is even more important. The use of capitals, punctuation, mode of dividing into paragraphs, of making erasures and interlineations, idiomatic expressions, orthography, mechanical construction, style of combination, and other evidences of habit are important elements upon which to form a judgment. An interesting case of this kind occurred in the Greenwich county court, in which the party denied most positively that a certain receipt was in his handwriting. It read: "Received the Hole of the above." Upon being asked to write a sentence containing the word "whole," he took pains to disguise his hand, but used the above phonetic style of spelling, even writing the capital "H," and then he ran away to escape prosecution for perjury. Rogers Expert Testimony, sec. 146; Taylor on Evidence, sec. 1669, note 1: Greenleaf on Evidence, sec. 581, note. See also Brooks v. Tichborne, 5 Exch. 929.

"Where an expert is undertaking to testify concerning handwriting, it is difficult to set any bounds to an examination which may reasonably tend to test the accuracy of his knowledge, skill and judgment." Cooley, J., in N. A. Fire Ins. Co. v. Throop, 22 Mich. 161. But where the plaintiff while upon the stand denied his signature to a paper produced by the defendant, it was held that upon cross-examination he was entitled to see the whole of a paper presented to him before he could be required to state whether or not the signature to said paper was his or not. N. A. Ins. Co. v. Throop, *supra*. Neither is it proper to require a witness upon cross-examination to point out upon a paper upon which the name in question has been written many times, the genuine signatures, if any, thereon. Massey v. Farmer's Nat'l Bank, 104 Ill. 327.

Some years since two anonymous letters, together with a number of letters written by several different persons, and the minutes of a scientific meeting

written by a party not suspected of being the author of the anonymous letters, were submitted to the writer for his opinion. A careful study of the documents led the writer to the conclusion that the anonymous letters were written by the writer of the minutes above referred to; this conclusion was so much at variance with the opinion of the party who submitted the documents for examination that he was disposed to reject it. The writer, however, persisted in his opinion, and upon confronting the supposed author of the anonymous letters with the opinion, and accusing him of the authorship of said anonymous letters, he broke down and acknowledged himself to be their author. In this case while the form of the letters in the several documents was not by any means identical, yet the manner of combining the several letters to form the more common particles, such as "the," "and," "of," "to," "for," etc., was identical in every instance, thus demonstrating to the mind of the writer the identity of their authorship.

Perfect identity of two signatures has hitherto been regarded as very strong, if not conclusive, evidence of fraud. In the famous Howland Will Case, 4 Am. Law Review, 625, 649 (also reported in the American Law Register, September 1890, p. 562), Professor Pierce, at that time professor of mathematics in Harvard University, testified that the odds were 2,666,000,000,000,000,000,000 to 1 that an individual could not with a pen write his name three times so exactly alike as were the three alleged signatures of Sylvia Ann Howland, the alleged testatrix of the will and two codicils. In that case, however, it appeared that the three signatures in question were in exactly similar situations upon the several sheets of paper upon which they were written. In the light of experience, however, the doctrine above stated requires limitation; and though identity of signatures in undoubtedly a suspicious circumstance, it is nevertheless true that not very unfrequently cases do occur in which signatures written in the ordinary course of business, and especially in the case of short signatures, do very nearly coincide upon superposition. No dogmatic rule, therefore, should be laid down, but each case should be decided upon its own circumstances.

4. Another means of detecting forgery is by the internal evidences of fraud afforded by the writing itself, with or without the aid of comparison with other and genuine writings.

These internal evidences may consist of alterations, such as erasures, additions, etc., above described, or of tracings of the genuine signature by means of a pen or pencil, which tracings are afterwards inked over with a pen, or they may be found in a copy of a genuine signature otherwise than by tracing, in the several manners above described. The copy or imitation of the genuine signature may be either free-hand or composite; by which latter is meant that the signature is made discontinously, or by piecemeal.

The detection of frauds attempted in the manner first above described is comparatively easy. A very low power of the microscope will readily reveal the erasures, and, not unfrequently, the word erased may be made out. When the signature has been traced over a genuine signature, usually the forger will be found to have failed to entirely cover the original tracings, the character of which, by the aid of a low power, can usually be satisfactorily made out. In this case, also, the signature will usually be found to be discontinuous, and the places where the pen has been put upon and removed from the paper in endeavoring to cover up the original tracings can be readily made out, and when thus made out this fact is strong, if not conclusive, evidence of fraud. When the signature has not been traced, but is composite or made by piecemeal in the manner above described, this can almost always be satisfactorily made out by the use of a low power, and when the composite character is so made out it is likewise strong, if not conclusive, evidence of fraud. Not unfrequently by the aid of the microscope it can be determined that alterations of the instrument were made with a different pen and with different ink, and not unfrequently the order in point of time in which they were made can likewise be determined. In questions of this sort, and in general in cases of disputed signatures, photography is of very great service. In the comparison of disputed signatures the writing in question should, if possible, be compared with the original and not with the photographic copy, such copy being considered by most courts as secondary evidence; nevertheless, photographic enlargements of genuine and disputed signatures, the correctness of which is established by testimony, are very useful as a means of illustrating the evidence of the expert. Nothing more than a provisional opinion should, however, be given upon a comparison by photographs alone; and not unfrequently such provisional opinion will be modified and sometimes reversed by the examination of the originals.

Not unfrequently, by the aid of photography differences in ink may be made out which are insensible to ordinary observation.

Many of the points above discussed were well exemplified in the Jerome will case, recently decided by the probate court of Cook county. In this case a most audacious attempt was made to impose upon the court a forged for a genuine will. The case turned upon the authenticity of the signature to the will, there being no dispute as to the handwriting in the body of the will. The signature in question was what I have above styled a composite signature. At what I may style the cardinal points of the signature there appeared upon the paper in immediate juxtaposition to the signature numerous indentations, which appeared to have been made with an instrument with a somewhat rounded point; these indentations, with two or three exceptions, did not come in contact with the writing. The writer testified, that in his opinion, from their position, they were made as caliper-marks or guides to the signature subsequently written. In one instance, namely, at the top of the initial "L," the mark took the form of a line extending across the loop of the letter "L," and the writer was able, by microscopic examination, to testify to the opinion that it was made before the signature was written; as also was the case with respect to one or two other of these indentations. The signature was likewise a composite one, from the fact that the pen of the writer appeared to have been removed from the paper at unusual places, forming breaks in the continuity of letters which are usually made by a continuous motion of the pen. This is well exemplified by the photographs. An examination under a low power likewise revealed the fact that in a number of instances the signature had been patched, or the lines retraced in certain portions where such patching or retracing would not ordinarily occur if the signature were a natural or genuine signature. From the combination of these three different classes of facts the writer was able to testify to the opinion that the signature was

a forgery. At this time there was not in the case any genuine signature with which the signature in question could be compared, and under the laws of the state of Illinois, as I have already stated, no signature could be used for such purposes unless properly in evidence in the case. This want the proponent's counsel supplied by his cross-examination of one or more witnesses put upon the stand by the party opposed the probate of the will. Enlarged copies of two of the signatures thus received in evidence are herewith presented for your consideration. The difference between the forged and the genuine signatures will be apparent from the examination of these enlargements. Without detaining you longer for the purpose of considering these specific differences, I may state that the court was of the opinion that the signature was not a genuine signature, and probate of the will was refused.—Marshall D. Ewell, LL.D. in the Chicago Law Journal.

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 11.

The publishers of that incomparable legal work, entitled, Cyclopedia of Law and Procedure, are turning out volumes at an unusually rapid rate. The ink is hardly dry on the review for one volume before the editors of legal publications are called upon to write a review for the next volume.

The eleventh volume of this work carries the subjects alphabetically from Costs to Creditors. The most import subjects are Costs, Counties and Courts. The subject of costs is ably handled in 293 pages by William A. Martin, and is the best, the most exhaustive, the most accurate treatise on this subject that has come under our observation. It is divided into 31 grand divisions. 1, Definition; 2, Source of Right to Costs; 3, By What Law Governed; 4, How Statutes Regulating Costs are Construed; 5, Right as Affected by Success or Failure of Party; 6, Right as Affected by Amount of Recovery; 7, Right as Affected by Character of Actions, Proceedings or Questions Involved; 8, Right as Affected by Character of Termination; 9, Right as Affected by Tender of Money or Offer of Judgment; 10, Right as Affected by Tender by Complainant in Equitable Action; 11, Right as Affected by Absence of Demand before Suit; 12, Right as Affected by Disclaimer; 13, Right as Affected by Settlement of Cause Out of Court; 14, Who Entitled to Costs; 15, Who Liable for Costs; 16, Liability of Fund for Payment of Costs; 17, Time of Vesting of Right to Costs; 18, Waiver, Release or Loss of Right to Costs; 19, Stipulations in Regard to Costs; 20, Amount and Items Allowable; 21, Award of Costs and Certificate; 22, Taxation and Correction of Erroneous Taxation; 23, Security for Costs; 24, Suits in Forma Pauperis; 25, Costs on Appeal or Error; 26, Costs on Award or Refusal of New Trial; 27, Enforcement of Payment of Costs; 28, In What Payment Made; 29, Recovery Back of Costs Paid; 30, Set-Off of Costs; 31, Costs in Criminal Cases.

The subject of Counties is a carefully prepared article by Mr. S. Blair Fisher and covers 290 pages of closely condensed matter, making a good sized law book, if properly padded as most law books are with quotations and long arguments. The subject of courts engages the services of two well-known law writers, Joseph A. Joyce and Howard C. Joyce. That statement is sufficient recommendation of the value of this article, which covers 387 pages of the 1197 pages of this volume.

Published by the American Law Book Company, New York.

DE BECKER'S JAPANESE CODE OF CIVIL PROCEDURE.

The Japanese are today the pre-eminent attraction among the nations of the world. No nation or people have more suddenly and rapidly sprung from the darkness of heathenism in the light and activities of modern civilization than Japan. They have studied medicine and science and the arts of war, and have excelled in all of them and in some have gone beyond many of the older nations. In public education, moreover, they have taken a step far in advance of the standards in vogue in this country. The laws of Japan, for instance, compel all children over the age of six years to go to school.

In law, also, they are fast approaching the van of the procession. One of the most important evidences of this progress in jurisprudence is the recent translation for non-residents of the Japanese Code of Civil Procedure by J. E. De Becker, of Yokohama, Japan.

This Code is sub-divided into ten books. Book I. is entitled, "General Provsions," and deals with the "competency" of courts. The word "competency" in this translation evidently means jurisdiction. This chapter also deals with parties to actions and with general matters of procedure, such as continuances, service, etc. Book II. is entitled, "Procedure in First Instance." The term "first instance" has a meaning in Japan similar to our phrase, *nisi prius*. It refers to the bringing of suits in the district courts and rules regulating the evidence, trial and judgments in such cases. Book III. is entitled, "Recourse," which word has a slightly wider signification than our word appeal. This chapter deals with appeals, revisions and complaints. Complaints constitute a method of appellate revision and the court hearing the complaints is called the "court of complaints." Book IV. is entitled, "Actions for Nullity and for Renewal of Procedure." The provisions of this chapter deal with methods of reviewing a decision after all ordinary methods of appeal and error have become outlawed or are inapplicable. The action for nullity is one simply to have a decision declared null and void and is generally brought by a defeated defendant. The action for renewal of procedure, is for the purpose of securing a new trial and is generally brought by a defeated plaintiff. The grounds for an action for nullity are jurisdictional; the action being similar to an action to set aside a judgment because of lack of jurisdiction in the court rendering it. Book V. is entitled "Suits of Documents." The first section describes the character of such suits. Actions for a claim, which has for its subject the presentation of a fixed sum of money, of a fixed quantity of other fungibles, or of a fixed number of documentary securities, can be instituted as a suit on documents, if all the facts forming the grounds of the claim can be proved by means of documents. Book VI. is entitled, "Actions Relating to Personal Status." This chapter deals with procedure in matters of marriage and of adoption, procedure in cases concerning the relations of parent and child, and procedure relating to adjudications of incompetency and quasi-incompetency. One of the peculiarities of divorce procedure is the power given to the trial courts to order a stay in proceedings for one year, of his own motion, if he believes from the evidence that there is a prospect of an amicable adjustment of the difficulty. Another interesting portion of this chapter is that relating to

the adjudications of insanity. The law provides that proceedings of this kind shall be strictly private. There is much to be said in favor of such a rule. Another rule is that no judgment of insanity shall be rendered except after a thorough examination of the facts in the presence of experts and these experts must express their opinion before the court can render its judgment. Book VII. is entitled, "Summary Procedure." Book VIII. is entitled, "Execution." Book IX. is entitled, "Public Summons Procedure." Book X. is entitled, "Arbitration Procedure."

It is, of course, impossible to give a full review of a work so technical as a foreign code of civil procedure. It is a work, however, which is splendidly executed, as far as codification has gone. Our only objection is that it contains 1,004 sections. And yet when we see some of our own smaller codes expanded by judicial construction to several times its original size we are compelled to admit the futility of confining any such lively subject as legal procedure into an unreasonably narrow compass. Our opinion is that this work will increase in importance as the commercial relations of this nation with Japan become more intimate and multiplied.

Printed in one volume of 273 pages and published by Kelly & Walsh, Yokohama, Japan.

BOOKS RECEIVED.

The Bankruptcy Act of 1898, Annotated and Explained, with the Amendments Thereto, all the Important and Latest Federal and State Decisions Thereon, and the General Orders and Forms Established by the U. S. Supreme Court. By John M. Gould, Joint Editor of Gould and Tucker's Notes on the United States Revised Statutes, and Arthur W. Blakemore, of the Boston Bar. Boston, Little, Brown & Company, 1904. Buckram, pp. 283. Price $3.00. Review will follow.

The Law of Waters and Waters Rights, International National, State, Municipal and Individual, Including Irrigation, Drainage and Municipal Water Supply. By Henry Philip Farnham, M. L. (Yale), Associate Editor of the Lawyers' Reports Annotated. Vols. 1, 2 and 3. Rochester, The Lawyers' Co-operative Publishing Company, 1904. Sheep, Price $18.00. Review will follow.

HUMOR OF THE LAW.

The late Judge James R. Smith, of Buffalo, was a man of exceedingly small stature. Associated with him in many of his cases was Dennis Bowen, a physical giant, and a man possessed of the keenest wit. Another celebrated attorney, who was brought in contact with both Judge Smith and Mr. Bowen, was former Lieutenant Governor Dorsheimer, of New York, who was also a man of great size.

It happened once that Mr. Dorsheimer was the opposing counsel in a case in which Mr. Smith—he was not a judge then—appeared for the plaintiff. The case was hotly argued. After Mr. Smith's address Mr. Dorsheimer arose.

"Gentlemen," he said, "my learned friend has told you a pretty story, but you have heard the evidence, and you are to judge as to whether my friend has told the truth or not."

Mr. Smith was furious. He rushed over to Mr. Bowen's office, and burst into the room.

"Dennis!" he cried, "Bill Dorsheimer called me a liar. What shall I do?"

The ponderous Mr. Bowen wheeled about in his chair, and, adjusting his glasses, he looked at Mr. Smith's diminutive form.

"Jim," he said, "the best thing you can do is stand on a chair and kick Bill."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

MONTANA....4, 19, 50, 58, 84, 125, 126
NEBRASKA, 20, 29, 72, 87, 107, 114, 119, 128, 135, 141, 143, 159, 170
NEVADA....12

1. ABATEMENT AND REVIVAL—Right to Accounting.—Pendency of an action by an agent against his principal for the determination of the value of his services, etc., held no bar to an action by the principal against the agent for an accounting.—Jordan v. Underhill, 86 N. Y. Supp. 620.

2. ACCORD AND SATISFACTION — What Constitutes. — Where money is tendered in satisfaction of a disputed claim, accompanied with a condition that, if it is accepted, it shall be in satisfaction of the claim, the acceptance held an accord and satisfaction.—Neeley v. Thompson, Kan., 75 Pac. Rep. 117.

3. ACTION—Misjoinder of Causes.—Under Rev. St 1898, § 2647, held, that there was no misjoinder of causes in an action by taxpayers to prevent the payment by the county treasurer of many fraudulent orders and judgments.—Carpenter v. Christianson, Wis., 98 N. W. Rep. 517.

4 ACTION—Motive for Enforcing Right.—One possessing a right may enforce it, irrespective of his motive in so doing; and his motive is not a subject of inquiry, except as ground for impeachment.—MacGinness v. Boston & M. Consol. Copper & Silver Min. Co., Mont., 75 Pac. Rep. 89.

5. ACTION—Technical Questions.—The provisions of the constitution and the laws cannot be disregarded by the courts, notwithstanding the fact that defenses interposed thereunder may be designated technical.—Stein v. Morrison, Idaho, 75 Pac. Rep. 246.

6. ADVERSE POSSESSION—Municipal Corporations.—An owner of property abutting on a street does not, by the occupancy of, and assertion of title to, a strip extending beyond the lot line as established by the plat up to the edge of the sidewalk, for a period of 10 years, acquire title thereto.—Markham v. City of Anamosa, Iowa, 98 N. W. Rep. 493.

7. ADVERSE POSSESSION—Vacation of Street.—Owners of lots abutting on a street, who petition the city council to vacate it, held estopped to claim title by adverse possession to the portion vacated.—Lake City v. Fulkerson, Iowa, 98 N. W. Rep. 376.

8. ALIENS—Statutes Relating to Descent.—An alien's right to take real estate in New York by descent is governed by the statutes in force at the time of the death of

the owner through whom such alien claimed title.—Stewart v. Russell, 86 N. Y. Supp.625.

9. ALTERATION OF INSTRUMENTS—Conditional Sale.—In action by seller to recover chattel sold on conditional sale, held error to exclude the note given for the price, on ground of an alteration.—Forbes v. Taylor, Ala., 35 So. Rep. 855.

10. APPEAL AND ERROR—Administrator's Petition to Sell Real Estate.—Administrator held to have appealable interest in order dismissing his petition for license to sell real estate.—*In re* Smith's Will, Oreg., 75 Pac. Rep. 133.

11. APPEAL AND ERROR—Assignment of Error.—An omnibus assignment of error to the overruling of a motion for verdict, based on three distinct grounds, is insufficient.—A. A. Cooper Wagon & Buggy Co. v. Barnt, Iowa, 98 N. W. Rep. 356.

12. APPEAL AND ERROR—Bill of Exceptions.—Where record contains no statement on appeal, no bill of exceptions, and no specification of error, appeal will be dismissed.—Griswold v. Bender, Nev., 75 Pac. Rep. 161.

13. APPEAL AND ERROR—Contempt of Appellant.—Defendant, against whom writs of *ne exeat* and of injunction have issued, who escapes, will not be heard on appeal to question the granting of the writs.—Bronk v. Bronk, Fla., 35 So. Rep. 870.

14. APPEAL AND ERROR—Contract for Support.—On appeal from a judgment on the judgment roll, a finding that nothing was due to defendant on her cross-complaint precludes the supreme court from directing judgment to be entered in her favor thereon.—Cohen v. Cohen, Cal., 75 Pac. Rep. 100.

15. APPEAL AND ERROR—Directing Verdict.—The direction of a verdict must be excepted to, and ruling and exception brought into a settled statement of the case, to make the ruling available for error on appeal.—McNab v. Northern Pac. Ry. Co., N. Dak., 98 N. W. Rep. 353.

16. APPEAL AND ERROR—Failure of Proof.—An objection that there was a failure of proof in an action on a stockholder's liability, not made before verdict was directed for defendant, held not proper for consideration on appeal.—Wineman v. Fisher, Mich., 98 N. W. Rep. 404.

17. APPEAL AND ERROR—Failure to Record Findings and Conc usions.—That the findings of fact and conclusions of law in a trial to the court were not entered in he record held no ground for reversing the judgment.—Kerns v. Lee, Oreg., 75 Pac. Rep. 140.

18. APPEAL AND ERROR—New Trial.—Where the court relieves a party from his failure to serve statement on motion for new trial in time, the supreme court will not presume that the new trial was refused for such delay.—Bailey v. Kreutzmann, Cal., 75 Pac. Rep. 104.

19. APPEAL AND ERROR—Order Granting Injunction Appealable.—An order entered on the minutes granting an injunction is an appealable order. – MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., Mont., 75 Pac. Rep. 89.

20. APPEAL AND ERROR—Remanding and Procedure Below.—Where the judgment on appeal in an equity case reverses the judgment below and remands the case, the trial court has discretion to proceed therein as justice may require.—Hoagland v. Stewart, Neb., 98 N. W. Rep. 428.

21. APPEAL AND ERROR—Ruling on Plea. — An order overruling a plea to require that another party be brought in as defendant, in a suit in equity to foreclose a mortgage, is not appealable. — Miller v. Hubbard, Mich., 98 N. W. Rep. 390.

22. APPEAL AND ERROR — Transcript. — A certificate that a transcript of the record is full held not impeached by a statement in the record from which a mere inference may be drawn that something has been omitted from it.—Pinney v. First Nat. Bank, Kan., 75 Pac. Rep. 119.

23. ASSAULT AND BATTERY—Description of the Means Employed.—Information under Pen. Code, § 245, for assault by means likely to produce great bodily harm, must particularly describe means employed, as required by sections 950, 952.—People v. Perales, Cal., 75 Pac. Rep. 170.

24. ASSIGNMENTS — Fraudulent Representations. — Where several stockholders in a corporation were induced to purchase their stock by defendant's misrepresentations, they were entitled to assign their causes of action for deceit to plaintiff, in order that a recovery for the entire wrong might be had in a single action.—Benedict v. Guardian Trust Co., 86 N. Y. Supp. 870.

25. ASSOCIATIONS—Authority of Officers.—Members of an unincorporated political organization held not liable for services of a person employed by the manager of a paper published by the organization, without proof of his authority to pledge their individual credit. — Hosman v. Kinneally, 86 N. Y. Supp. 263.

26. ATTORNEY AND CLIENT — Employment by Insolvent Debtor.—Where an attorney is employed by an insolvent, he has no lien on the fund in the hands of receivers of such insolvent for his compensation.—Ford v. Gilbert, Oreg., 75 Pac. Rep. 138.

27. ATTORNEY AND CLIENT—Notice of Lien for Services.—A notice of lien on money to be recovered in a personal injury action, signed by an attorney for his client, instead of for himself, is sufficient to apprise defendant of a claim to a lien as attorney.—Gibson v. Chicago, M. & St. P. R. Co., Iowa, 98 N. W. Rep. 474.

28. BANKRUPTCY—Failure to Have Claim Scheduled.—The burden is on a bankrupt to show that a creditor whose claim was not scheduled had notice or actual knowledge of the bankruptcy proceedings. — Wineman v. Fisher, Mich., 98 N. W. Rep. 404.

29. BANKRUPTCY—Fraudulent Conveyance.—Where a creditor of a bankrupt has secured a preference, the trustee cannot, under Bankr. Act July 1, 1898, ch. 541, § 60, subd. "b," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], pursue the property into the hands of a *bona fide* purchaser.—Hackney v. First Nat. Bank, Neb., 98 N. W. Rep. 412.

30. BANKS AND BANKING—Action to Recover Deposit.—In an action to recover a savings bank deposit, it was proper for the court to direct the surrender of the pass book to the bank, on an application to make an adverse claimant a party defendant before trial.—Quinn v. Bank for Savings of City of New York, 86 N. Y. Supp. 285.

31. BANKS AND BANKING — Effect of Insolvency on Breached Lease.—On breach of a lease of a banking house, the lessor held entitled to have his claim for damages for the loss sustained allowed by the bank's receiver.—McGraw v. Union Trust Co., Mich., 98 N. W. Rep. 390.

32. BANKS AND BANKING—Payment of Moneys Deposited in Another's Name. — Where one having certain money deposited it in a bank in the name of a third party, held, that he could not recover against the bank, where it acted in good faith and paid it to such third party.—Arkofsky v. State Savings Bank, Minn., 98 N. W Rep. 326.

33. BANKS AND BANKING—Personal Liability of Stockholders.—Stockholders of an insolvent bank are not bound by a judgment entered against the bank in proceedings to which they are not parties as to questions respecting their personal liability as stockholders.—*In re* Receivership of Germania Bank, Minn., 98 N. W Rep. 341.

34. BANKS AND BANKING—Reliance Upon Representations of Maker of Note.—Assignee of note and account held entitled to rely on representations of maker of note, made to assignor, as to his ownership of account. — Willey v. Crocker-Woolworth Nat. Bank, Cal., 75 Pac. Rep. 106.

35. BENEFIT SOCIETIES — Materiality of Answers to Questions on Application. — The test, in determining whether questions contained in an application for insurance are material is: Would the knowledge of the facts materially influence the action of the insurer?—Mattson v. Modern Samaritans, Minn., 98 N. W. Rep. 330.

36. BENEFIT SOCIETIES — Sick Benefits. — Member of beneficial association and his administratrix held pre-

cluded from contesting amendment to constitution fixing maximum for sick benefits. — Berg v. Badenser Understuetzungs Verein von Rochester, 86 N. Y. Supp. 429.

37. BILLS AND NOTES—Consideration.— The promise of a debtor to keep an overdue loan secured by mortgage and pay a reduced rate of interest for a definite period is a sufficient consideration for an extension of the note.—Lorimer v. Fairchild, Kan., 75 Pac. Rep. 124.

38. BILLS AND NOTES — Fraudulent Circulation.—As against the maker of a note fraudulently put into circulation, the burden of proof is on the indorsee to show that it is a *bona fide* holder.— Robbins v. Swinburne Printing Co., Minn., 98 N. W. Rep. 331.

39. BILLS AND NOTES—Illegal Consideration.—The taking of a note, the consideration of which is the sale of a patent right, without inserting therein the words "Given for a patent right," is a misdemeanor, within Gen. St. 1901, § 4357, and no recovery can be had thereon.—Pinney v. First Nat. Bank, Kan., 75 Pac. Rep. 119.

40. BILLS AND NOTES—Indorser's Liability.—Where the proceeds of certain property were credited on a note, with intent to discharge the debt to such extent, the liability of the sureties was discharged *pro tanto*.—Jefferson County Nat. Bank v. Dewey, 86 N. Y. Supp. 350.

41. BROKERS—Commissions.—Custom of sellers to pay commissions to real estate agents does not render seller liable to purchaser's agent.—Downing v. Buck, Mich., 98 N. W. Rep. 388.

42. CARRIERS—Bill of Lading.—In an action to recover iron, which claimant claimed under an assignment of a shipping receipt, instructions as to the rights of a *bona fide* purchaser for value of a bill of lading without notice held properly refused.—Hart v. Boston & M. R. R., N. H., 56 Atl. Rep. 920.

43. CARRIERS—Premature Starting of Car.—Where the evidence introduced by a passenger in an action for injuries by the alleged premature starting of the car was contradictory, a verdict in her favor was properly set aside.—Northington v. Norfolk Ry. & Light Co., Va., 46 S. E. Rep. 475.

44. CARRIERS—Refusal to Give Transfer.—Street railroad company held not excused from giving transfers at a point because it would cause undue crowding in the street.—Topham v. Interurban St. Ry. Co., 86 N. Y. Supp. 295.

45. CARRIERS—Riding on Engine.—A person riding on the engine of a freight train, at the direction of the engineer and with the knowledge of the conductor, held not entitled to the rights of a passenger.—Radley v. Columbia Southern Ry. Co., Oreg., 75 Pac. Rep. 212.

46. CERTIORARI—Writ of Review.—All objections to form of petition for writ of review to the court of appeal must be presented on the first opposition to the granting of the rule *nisi*.—Harrison v. Ottman, La., 35 So. Rep. 844.

47. CHAMPERTY AND MAINTENANCE — Assignment of Claim to Attorneys.—That assignment of claim on injunction bond to attorneys is champertous held not a defense to obligors therein.—Lacey v. Davis, Iowa, 98 N. W. Rep. 366.

48. CONSTITUTIONAL LAW — Desecration of National Flag.—Pen. Code, § 640, subd. 16, prohibiting mutilating, defacing or casting contempt on the United States flag, or state flag, etc., held a proper exercise of the state's police power.—People v. Van De Carr, 86 N. Y. Supp. 644.

49. CONSTITUTIONAL LAW — Executive Acts. — Under Const. art. 2, § 1, the judicial department cannot prohibit the executive department from acting within the recognized scope of that branch of the government.—Stein v. Morrison, Idaho, 75 Pac. Rep. 246.

50. CONSTITUTIONAL LAW—Intoxicating Liquors.—Any invalidity or local option law, Pol. Code, pt. 3, tit. 7, ch. 10, §§ 3180-3188, in not excepting liquor for medicinal and sacramental purposes or in original packages, held not available to one who sold liquor otherwise.—*In re* O'Brien, Mont., 75 Pac. Rep. 196.

51. CONSTITUTIONAL LAW—Right to Compel Certain Business to Cease on Sunday.—Laws 1903, p. 652, ch. 362, which prohibits the keeping open of butcher shops and other business places on Sunday, held not an unreasonable discrimination between these several occupations, so as to invalidate the law, under Const. art. 4, §§ 33-34. —State v. Justus, Minn., 98 N. W. Rep. 325.

52. CONTRACTS—Agreement to Promote a Corporation. —In an action for the value of services in promoting a corporation, plaintiff held not entitled to recover on the ground that defendant prevented a performance of the contract.—Locke v. Wilson, Mich., 98 N. W. Rep. 400.

53. CONTRACTS—Delay in Construction of Building.— A contractor held not liable for delay in completing the building, if he was prevented from completing any particular part of the work by delays occasioned by the acts of the owner, his contractors, servants or agents.— Cornell v. Standard Oil Co., 86 N. Y. Supp. 633.

54. CONTRACTS—Provisions for Support.— Contract for monthly payments to father during life, and daughters while unmarried after the father's death, held to require payments to one unmarried daughter after marriage of the other.—Cohen v. Cohen, Cal., 75 Pac. Rep. 100.

55. CONTRACTS—Reference to Plans.—Where a written building contract refers to a plan that is not identified, and two plans are offered in evidence, it is for the jury to determine which one is the plan referred to.—Cook v. Littlefield, Me., 56 Atl. Rep. 899.

56. CONTRACTS—Violation of Statute.—Where a statute expressly provides that a violation thereof shall be a misdemeanor, a contract in violation of the same is illegal.—Finney v. First Nat. Bank, Kan., 75 Pac. Rep. 119.

57. CORPORATIONS—Officer's Purchase of Claim Against Corporation.—A treasurer of a corporation held liable to it for profit made by him on the purchase of a claim against the corporation.—The Telegraph v. Lee, Iowa 98 N. W. Rep. 364.

58. CORPORATIONS—Rights of Minority Stockholders.— A court of equity cannot, at the instance of a minority stockholder, forfeit the stock of another stockholder on the ground that his title is held in violation of law.— MacGinniss v. Boston & M. Consol. Copper & Silver Min Co., Mont., 75 Pac. Rep. 89.

59. CORPORATIONS—Stockholder's Liability.—A judgment and unsatisfied execution against a corporation held admissible against a stockholder, as against an objection that he was not bound thereby.—Wineman v. Fisher, Mich., 98 N. W. Rep. 404.

60. CRIMINAL EVIDENCE—Stick as a Deadly Weapon.— Opinions of witnesses that a stick with which deceased had attempted assault on accused was a deadly weapon held inadmissible.—Majors v. State, Miss., 35 So. Rep. 625.

61. CRIMINAL EVIDENCE—Witness Interested in Conviction by Reason of Reward.—That a witness in a capital case received a part of a reward offered for the conviction of the one who committed the crime is not a cause for a new trial.—State v. Levy, Idaho, 75 Pac. Rep. 227.

62. CRIMINAL LAW—Bill of Exceptions.—Where the contention is presented by a bill of exceptions, reversal can only be had when the facts exclude every reasonable hypothesis consistent with the verdict.—State v. Ronk, Minn., 98 N. W. Rep. 334.

63. CRIMINAL LAW—Reasonable Doubt.—It is a circumstance which ought to be considered, if it is shown beyond a reasonable doubt that accused had a strong motive to commit the crime with which he is charged.— State v. Levy, Idaho, 75 Pac. Rep. 227.

64. CRIMINAL TRIAL—Assault and Robbery.—On trial for assault and robbery, refusal to charge on the lower grades of petit larceny held not a ground for new trial,

where defendants were convicted of robbery.—State v. Pastor, La., 35 So. Rep. 889.

65. CUSTOMS DUTIES—Binding Effect.—Custom cannot make a contract, when the parties themselves have made none.—McSherry v. Blanchfield, Kan., 75 Pac. Rep. 121.

66. DAMAGES—Breach of Contract.—Where plaintiff sold cotton, and ordered it compressed and shipped by a certain time, and the compress company failed to do this, he can recover the difference in price between the cotton sold and that purchased to fill his contract.—Loeb v. Homer Compress & Mfg. Co., La., 35 So. Rep. 843.

67. DAMAGES—Injury to Servant.—In an action by a servant against his master for personal injuries, the value of services in another state, on account of care and nursing, rendered necessary by the injuries, held properly shown in proof of special damages.—Vedder v. Delaney, Iowa, 98 N. W. Rep. 373.

68. DAMAGES—Pleading.—In action for injuries, damages for medical care, nursing, etc., must be specially pleaded, but need not be specially itemized.—Turney v. Southern Pac. Co., Oreg., 75 Pac. Rep. 144.

69. DEDICATION—Life Estate with Power of Sale.—A grant of power of sale of the fee, added to a life estate, is not inconsistent with a remainder created by the same deed, and limited to take effect on the death of the life tenant.—Dickey v. Barnstable, Iowa, 98 N. W. Rep. 368.

70. DEDICATION—Presumption that Deeds were Delivered.—Where conveyances are duly executed, and are found in the hands of the grantee, it is presumed they were duly delivered.—Nowlen v. Nowlen, Iowa, 98 N. W. Rep. 383.

71. DEDICATION—Title to Street.—Where the owner of land in a city acknowledges and records a plat thereof, and sets apart a portion for a street, his subsequent vendees of lots abutting on the street acquire thereby no title to any part of the street.—Lake City v. Fulkerson, Iowa, 98 N. W. Rep. 376.

72. DEEDS—Undue Influence.—Evidence that a frail old man conveyed all his property, to the value of many thousand dollars, to his housekeeper, without a consideration, held sufficient to avoid the deed for undue influence.—Aldrich v. Steen, Neb., 98 N. W. Rep. 445.

73. DEPOSITIONS—Use in Another Suit.—A deposition taken by a defendant in a suit by one creditor to set aside a fraudulent conveyance cannot be used by him in another suit by another creditor to impeach the same conveyance.—Miller v. Gillispie, W. Va., 46 S. E. Rep. 451.

74. EJECTMENT—Taking Property for County Road.—Statement of form of judgment for award on appeal from assessment of damages in the matter of the location of a county road.—McCall v. Marion County, Oreg., 75 Pac. Rep. 140.

75. ELECTIONS—Contests.—Proceedings in the nature of *quo warranto* are not necessary, instead of proceedings in the nature of a contest, where one has been merely shown by election returns to be elected.—Sweeney v. Adams, Cal., 75 Pac. Rep. 182.

76. ELECTIONS—Of State Control Committee.—Where the Democratic state central committee provided for election of members of that body at the general state primary, to be conducted by the same commissioners and clerks, the Democratic parish committee has no power to appoint additional commissioners. — State v. St. Paul, La., 35 So. Rep. 838.

77. ELECTRICITY—Safety of Appliances Used.—In an action for the death of plaintiff's decedent, caused by an electric shock, defendant held not guilty of negligence in using an ordinary brass socket on the circuit conducting the electricity to a light on his premises.—Martinek v. Swift & Co., Iowa, 98 N. W. Rep. 477.

78. EMINENT DOMAIN—Betterments on Land.—Widow, holding land which other heirs are entitled to share, should share proceeds of condemnation, except with heir who was party and defaulted. — Legg v. Legg, Wash., 75 Pac. Rep. 130.

79. EMINENT DOMAIN—Condemnation of Property for Waterworks.—Where a city is authorized to contract for waterworks and purchase necessary property, it need not provide at once for payments therefor before condemning property therefor.—City of Dallas v. Hallock, Oreg., 75 Pac. Rep. 204.

80. EMINENT DOMAIN — Village Control of Streets.—A village cannot give permission to construct or continue water mains through the public streets by a private corporation, without compensation to the owner of the land through whose soil the pipes are being maintained.—Jayne v. Cortland Waterworks Co., 86 N. Y. Supp. 571.

81. EQUITY—Abatement of Nuisance. — Incorporation of an allegation of mistake in a deed held not fatal to a bill, the primary object of which was to enjoin abatement of a nuisance.—Reese v. Wright, Md., 56 Atl. Rep. 976.

82. EVIDENCE—Broker's Action for Commission.—In an action by a real estate agent for commissions, a question, "For whom were you acting in this sale?" was properly excluded, as calling for plaintiff's undisclosed purpose.—Downing v. Buck, Mich., 98 N. W. Rep. 888.

83. EVIDENCE — Constitutional Methods of Raising Revenue.—The court must take judicial notice of the constitutional methods provided for raising revenue, but will assume that the legislature kept within the constitutional limits.—Stein v. Morrison, Idaho, 75 Pac. Rep. 246.

84. EVIDENCE—Declarations Subsequent to Transaction.—Declarations of agent subsequent to transaction held hearsay and inadmissible.—Hogan v. Kelly, Mont., 75 Pac. Rep. 81.

85. EVIDENCE—Defense of Insanity in Murder Case.—In a prosecution for murder, defended on the ground of insanity, an instruction cautioning the jury against being imposed on by an "ingenious counterfeit of insanity," cannot be held to be prejudicially erroneous, though the same is not approved. — People v. Manoogian, Cal., 75 Pac. Rep. 177.

86. EVIDENCE—Mental Capacity. — Where insanity is once established, it will be presumed to continue until the contrary is shown.—*In re* Knox's Will, Iowa, 98 N. W. Rep. 468.

87. EVIDENCE—Res Gestæ. — Admissions by a hired manager of a hotel as to trespass committed on a guest, made a day after the trespass, are inadmissible as part of the *res gestæ*.—Clancy v. Barker, Neb., 98 N. W. Rep. 440.

88. EVIDENCE—Variation of Contract by Parol.—Parol evidence of a prior or contemporaneous verbal agreement is not admissible to vary the terms of a contract of conditional sale of a chattel.—Forbes v. Taylor, Ala., 35 So. Rep. 855.

89. EXECUTORS AND ADMINISTRATORS—Laches in Procurement of Letters.—Delay of nearly 10 years in procuring letters of administration held not such laches as to bar administrator's right to sell realty of the estate.—*In re* Smith's Will, Oreg., 75 Pac. Rep. 133.

90. EXECUTORS AND ADMINISTRATORS—Persons Entitled to Administration.—Letters of administration may not be refused to one entitled thereto as of right, because he makes an adverse claim to property claimed by the estate; this not being a ground of disqualification under the statute.—*In re* Brundage's Estate, Cal., 75 Pac. Rep. 175.

91. EXECUTORS AND ADMINISTRATORS — Rights of Widow.—An administrator is not liable to intestate's widow for rents collected from the estate till her distributive share is set aside.—*In re* Pennock's Estate, Iowa, 98 N. W. Rep. 480.

92. FIRE INSURANCE—Agent's Authority to Waive Provisions of Policy.—In order that insurance company may successfully deny agent's authority to waive a provision of the policy, insured must have actual notice of limitations on the agent's power.—Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., Va., 46 S. E. Rep. 463.

93. FIRE INSURANCE—Assignment After *Loss*.—The fact that no fund is shown to have been in the hands of an insurance company as due on a policy held not to prevent the equitable transfer of the proceeds of the policy.—Freis v. Little Black Farmers' Mut. Ins. Co., Wis., 98 N. W. Rep. 372.

94. FRAUDULENT CONVEYANCES—Bankruptcy.—In an action to set aside a transfer by a bankrupt, evidence of his transactions with others than the transferee in question held inadmissible against the latter without evidence of his knowledge thereof.—Doxsee v. Waddick, Iowa, 98 N. W. Rep. 483.

95. FRAUDULENT CONVEYANCES—Title in Wife.—Where a wife, in a contest against the creditors of her husband, claimed to have purchased and improved real estate, there is a presumption against the good faith of the transaction.—Miller v. Gillispie, W. Va., 46 S. E. Rep. 451.

96. HIGHWAYS—Adverse Possession by Railroad.—Orders of county court granting railroad right to construct tracks on highway, and occupancy of highway by railroad, held not to constitute abandonment of highway by county court or public.—Turney v. Southern Pac. Co., Oreg., 75 Pac. Rep. 144.

97. HIGHWAYS—Negligent Construction.—Where a town so negligently constructed a highway that the waters of a slough were cast on the farm of an adjoining landowner, the town was liable.—Gunnerus v. Town of Spring Prairie, Minn., 98 N. W. Rep. 340.

98. HOMESTEAD—Portion of Premises Used for Business.—The partial use of a room and the front windows for business purposes held not to deprive the owner of a building of her exemption thereof as a homestead.—Edmonds v. Davis, Iowa, 98 N. W. Rep. 375.

99. HOMESTEAD—Property Subject to Execution.—The vendee in an executory contract for the sale of land is entitled to his homestead in the property, which may be set apart by the officer making the sale on execution, under Gen. St. 1894, §§ 5523-5525.—Hook v. Northwest Thresher Co., Minn., 98 N. W. Rep. 463.

100. HOMICIDE—Adultery of Wife.—A husband who, on discovering his wife in the act of adultery, instantly shoots at and kills her or her paramour, is guilty only of manslaughter.—Rowland v. State, Miss., 35 So. Rep. 826.

101. HOMICIDE—Failure to Request Certain Instructions.—Where the court, on a trial for manslaughter in the first degree, did not instruct on the law of manslaughter in the third degree, and was not requested so to do, defendant was not prejudiced.—State v. Ronk, Minn., 98 N. W. Rep. 334.

102. INDEMNITY—Liability of Contractor.—Payment in full of a contractor, constructing pavement under an agreement to save the city harmless, was not a waiver of the agreement.—City of Detroit v. Grant, Mich., 98 N. W. Rep. 405.

103. INDICTMENT AND INFORMATION—Wife as Witness Before Grand Jury.—Setting aside indictment, on the ground that defendant's wife was a witness against him before the grand jury, held erroneous, under Code, § 5319.—State v. De Groate, Iowa, 98 N. W. Rep. 495.

104. INJUNCTION—Condemnation Proceedings.—Injunction will lie to restrain the taking of private property by railroad company, which is not covered by its proceedings to condemn adjoining land.—Shipley v. Western Maryland Tidewater R. Co., Md., 56 Atl. Rep. 968.

105. INJUNCTION—Restraining Breach of Contract.—Complainant held not entitled to injunction to restrain breach of contract against public policy.—Fullington v. Kyle Lumber Co., Ala., 35 So. Rep. 852.

106. INJUNCTION—Wrongful Use of Premises.—An injunction was not to be refused because defendant had almost completed his wrongful use of plaintiff's premises.—Rhoades v. McNamara, Mich., 98 N. W. Rep. 392.

107. INNKEEPERS—Rights of Guests.—A trespass committed on a guest in a hotel by a servant of the proprietor held a breach of the undertaking of a hotel keeper that a guest shall be treated with due consideration for his comfort and safety.—Clancy v. Barker, Neb., 98 N. W. Rep. 440.

108. INTOXICATING LIQUORS—Exemplary Damages.—Under Comp. Laws 1897, § 5398, exemplary damages for selling liquor to plaintiff's husband can only be granted for injury to plaintiff's feelings, and not to punish defendant.—Bowden v. Voorheis, Mich., 98 N. W. Rep. 406.

109. INTOXICATING LIQUORS—Rights Under License.—Under Code, § 2432, the holder of a liquor license for a particular building held not entitled to divide the first floor into two rooms by a solid partition, and use one of them as a retail liquor saloon and the other to store liquors sold by him at wholesale.—Thomas v. Arie, Iowa, 98 N. W. Rep. 380.

110. INTOXICATING LIQUORS—Sales by Druggists.—A blank affidavit, containing nothing but the signature of a notary public, does not comply with the law requiring a druggist to "make and swear to" his report of liquor sold.—People v. Remus, Mich., 98 N. W. Rep. 397.

111. JUDGMENT—Failure to Appear for Trial.—A statement of defendant's counsel, on a case being called for trial in plaintiff's absence, that he did not believe plaintiff intended to prosecute his action, whereupon the court ordered the case to proceed, held not prejudicial to plaintiff.—Stewart v. Gorham, Iowa, 98 N. W. Rep. 512.

112. JUDGMENT—Protection by Court.—Courts will not substitute their judgment for that of the donor of a power in not requiring security from the appointee for the proper exercise thereof.—Dickey v. Barnstable, Iowa, 98 N. W. Rep. 368.

113. JURY—Award of Damages by Court.—An award of damages by the court in enjoining a continuing trespass was not objectionable, as depriving the defendant of his right to a jury trial.—Rhoades v. McNamara, Mich., 98 N. W. Rep. 392.

114. LANDLORD AND TENANT—Forfeiture of Lease for Non-Payment of Rent.—In the absence of a statute providing otherwise, a demand of rent on the day it becomes due is necessary for a forfeiture for non-payment, unless waived in lease.—Godwin v. Harris, Neb., 98 N. W. Rep. 429.

115. LANDLORD AND TENANT—Tenancy at Will.—Where a written lease under which plaintiff entered was void under the statute of frauds, and his tenancy became a tenancy at will, the parties were not governed as to the duration of the tenancy or the manner of terminating it by the written contract.—Goodwin v. Clover, Minn., 98 N. W. Rep. 322.

116. LIBEL AND SLANDER—Venereal Disease.—Words charging another with being afflicted with venereal disease are slanderous *per se*, and proof of their utterance establishes malice, without other evidence.—McDonald v. Nugent, Iowa, 98 N. W. Rep. 506.

117. LIMITATION OF ACTIONS—Admission that Debt Was Unpaid.—To avoid limitations against a note, it is unnecessary that a writing should expressly admit that the debt is unpaid; but it is enough if it clearly and unequivocally refers to the note.—Will v. Marker, Iowa, 98 N. W. Rep. 487.

118. MALICIOUS PROSECUTION—Ground of Action.—The dismisssal of an action after defendant's appearance constitutes a sufficient legal determination thereof to support an action for malicious prosecution.—Hurgren v. Union Mut. Life Ins. Co., Cal., 75 Pac. Rep. 168.

119. MARRIAGE—Mental Incapacity.—Mental weakness, not amounting to inability to contract in ordinary affairs, will not alone avoid a marriage.—Aldrich v. Steen, Neb., 98 N. W. Rep. 445.

120. MARRIAGE—Performed by Mayor Outside of Corporate Limits.—Under Code, § 3147, a marriage performed by a mayor outside the corporate limits of the town held valid as a ceremonial marriage.—State v. McKay, Iowa, 98 N. W. Rep. 510.

121. MASTER AND SERVANT—Employee of Independent Contractor.—A railroad company held not liable to an employee of an independent contractor for personal injuries received by him from being struck by a stone knocked against plaintiff by a passing train.—Reilly v. Chicago & N. W. Ry. Co., Iowa, 98 N. W. Rep. 464.

122. MASTER AND SERVANT—Injury to Minor.—If a minor servant, with knowledge of dangers of his employment, voluntarily encounters the risk, and is injured through his own negligence, the employer is not responsible, whether he has instructed the minor or not.—Fries v. American Lead Pencil Co., Cal., 75 Pac. Rep. 164.

123. MASTER AND SERVANT—Measure of Compensation After Termination of Contract.—Where a servant performs services for the master with his assent after the termination of the hiring, the measure of recovery is limited by the contract price.—Laubach v. Cedar Rapids Supply Co., Iowa, 98 N. W. Rep. 511.

124. MASTER AND SERVANT—Safe Place to Work.—It is the duty of a master to use ordinary care to provide a reasonably safe place in which his servant is to work.—Parlett v. Dunn, Va., 46 S. E. Rep. 467.

125. MINES AND MINERALS—Suit to Determine Adverse Claim.—In a suit to determine an adverse claim against an application for a patent to a mining claim, the United States is a *quasi* party, and entitled to a finding, if neither plaintiff nor defendant is entitled to a patent.—Wilson v. Freeman, Mont., 75 Pac. Rep. 84.

126. MONOPOLIES—Action by Private Citizens.—A private citizen cannot, in a civil action, try the issues as to corporate violations of law; but such questions, as independent grounds of relief, must be determined on behalf of the state, through the attorney general.—MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., Mont., 75 Pac. Rep. 89.

127. MORTGAGES — Absolute Deeds.— Though a deed was in fact given as security against future liability on account of the grantor, where it was absolute in terms, it vested in the grantee the legal title to the land.—Baxter v. Pritchard, Iowa, 98 N. W. Rep. 372.

128. MORTGAGES — Unrecorded Release From Mortgagee.—One who purchases mortgaged real estate, and receives an unrecorded release from the mortgagee after he had assigned the notes and sold the mortgage, cannot resist foreclosure by a *bona fide* holder of the unpaid notes.—Heintz v. Klebba, Neb., 98 N. W. Rep. 431.

129. MUNICIPAL CORPORATIONS—Damage to Abutting Property Owners.—A city is liable for damages to an abutting property owner from cutting down the street in front of the property, except for the purpose of bringing the street to a grade established by ordinance.—Markham v. City of Anamosa, Iowa, 98 N. W. Rep. 493.

130. MUNICIPAL CORPORATIONS—Defective Sidewalks.—Where, in an action for injuries from defective sidewalk, it appears that the defect had existed for six months, the jury is warranted in inferring knowledge thereof by the town authorities.—Brown v. Incorporated Town of Chillicothe, Iowa, 98 N. W. Rep. 502.

131. MUNICIPAL CORPORATIONS—Duties of Police Sergeant.—Ignorance of rules by police sergeant is an excuse for their violation, the sufficiency of which is to be determined by commissioner.—People v. Greene, 86 N. Y. Supp. 322.

132. MUNICIPAL CORPORATIONS — Local Self-Government.—Under Const. 1890, § 139, municipalities within the state held not entitled to local self-government.—Adams v. Kuykendall, Miss., 35 So. Rep. 830.

133. MUNICIPAL CORPORATIONS—Presentation of Demands.—That a claim for damages has been presented to the city council is a necessary allegation in a suit therefor against the city.—Bigelow v. City of Los Angeles, Cal., 75 Pac. Rep. 111.

134. NAVIGABLE WATERS—Driving Logs.—What constitutes a sufficient means of passage for logs in streams, over dams erected in such streams under Gen. St. 1897, § 2385-2386, depends on the conditions of each particular case.—Crookston Waterworks, Power & Light Co. v. Sprague, Minn., 98 N. W. Rep. 347.

135. NEWSPAPERS—Notice of Sittings of Board of Equalization.—The provision of Comp. St. 1898, ch. 12a, § 85, as to notice of the sitting of a board of equalization, held met by publication in two daily papers in the English language and one paper in the German language, when these are all the daily papers published in the city.—John v. Connell, Neb., 98 N. W. Rep. 457.

136. NEW TRIAL—Discretion of Court.—It is within the discretion of the court, in case of excusable neglect, to relieve a party desiring to move for a new trial from his failure to serve the statement in time.—Bailey v. Kreutzmann, Cal., 75 Pac. Rep. 104.

137. PARTNERSHIP—Firm Note.—Execution of note for loan under firm name held not to show that lender dealt with borrower as a firm, where it believed firm and borrower to be same.—Willey v. Crocker-Woolworth Nat. Bank, Cal., 75 Pac. Rep. 106.

138. PARTNERSHIP—Ostensible Partners.—In an action by the assignee of a secret partner to recover a bank deposit belonging to the firm, evidence held insufficient to support a finding that defendant did not know ostensible partner was alone in business.—Willey v. Crocker-Woolworth Nat. Bank, Cal., 75 Pac. Rep. 106.

139. PARTY WALLS—Extension Beyond Division Line.—Where adjoining owners erect a party wall, standing on both sides of the line, each owns in severalty so much as stands on his own land, subject to an easement in favor of the other party.—Johnson v. Minnesota Tribune Co., Minn., 98 N. W. Rep. 321.

140. PLEADINGS—Calendar Motions.—When defendant objects to the notice of a cause for trial, on the ground that it is not at issue, he should move to strike it from the docket, or for a continuance, on the first day of court.—Marvin v. Bowlby, Mich., 98 N. W. Rep. 399.

141. PRINCIPAL AND AGENT—Ambiguous Instruction.—Where an agent in good faith and without negligence acts upon his own understanding of ambiguous instructions, he is not liable to his principal, although his interpretation may be erroneous.—Falksen v. Falls City State Bank, Neb., 98 N. W. Rep. 425.

142. PROHIBITION—Legislative Appropriations.—The common-law writ of prohibition does not lie to prohibit ministerial acts, but runs to restrain encroachment of jurisdiction assumed to be the exercise of a judicial or *quasi* judicial function.—Stein v. Morrison, Idaho, 75 Pac. Rep. 246.

143. PUBLICATION—Foreclosure.—Where a newspaper has the requisite publication and circulation in a county, that it is an exponent of socialistic doctrines does not render a publication of notice of foreclosure therein unlawful.—Michigan Mut. Life Ins. Co. v. Klatt, Neb., 98 N. W. Rep. 436.

144. QUIETING TITLE—Right of Action by Administrator.—An administrator held to have such an interest as entitled him to sue, under B. & C. Comp. § 516, to determine an adverse claim to real estate, especially where the estate of his intestate is insolvent.—Ladd v. Mills, Oreg., 75 Pac. Rep. 141.

145. RAILROADS—Injury to Borrower of Hand Car.—One who borrows a hand car for use on a railroad from an employee, who is without authority to loan it, is a mere trespasser.—Louisville & N. R. Co. v. Wade, Fla., 35 So. Rep. 863.

146. RAILROADS—Occupancy of Highway.—Where a railroad entered upon and occupied a highway by permission of and under contract with the county court, its possession was not adverse to the public.—Turney v. Southern Pac. Co., Oreg., 75 Pac. Rep. 144.

147. RAILROADS—Trespasser on Train.—In an action for injuries to a trespasser on a train, evidence held not to authorize finding that conductor kicked the boy off the train, or so frightened him that he jumped off.—

Georgi R. & Banking Co. v. Frazier, Ga., 46 S. E. Rep. 451.

148. RECEIVERS—Subjection of Funds to Pay Insolvent's Legal Fees.—An insolvent, after the appointment of a receiver, cannot subject the fund in the hands of the receiver to any legal liability.—Ford v. Gilbert, Oreg., 75 Pac. Rep. 138.

149. REPLEVIN—Identity of Articles.—One who obtained lawful possession of articles used in constructing his building held not liable therefor in replevin, brought after he sold the building.—Murray v. Lese, 86 N. Y. Supp. 581.

150. SALES—Stipulation as to Use.—Seller of threshing machine held to have waived stipulation that six days' possession should be conclusive evidence of fulfillment of warranty.—Massillon Engine & Thresher Co. v. Shirmer, Iowa, 98 N. W. Rep. 504.

151. SHIPPING—Death of Licensee.—The owner of a sailing vessel, which is tied to the owner's private wharf, owes no duty to licensees to keep its premises or the passageway from the wharf to the vessel in a safe condition.—Grundel v. Union Iron Works, Cal., 75 Pac. Rep. 184.

152. SPECIFIC PERFORMANCE—Contract for the Sale of Land.—That land is worth exactly the contract price, so that, when for refusal by the vendor to perform the vendee's damages would be but nominal, is no ground for refusing specific performance.—Bradford v. Smith, Iowa, 98 N. W. Rep. 377.

153. SPECIFIC PERFORMANCE—Purchase of Land.—Complaint in an action to enforce specific performance of a contract on the part of a corporation to issue 30 per cent. of its common stock, in consideration of the transfer to it of certain land contracts of purchase, held to state a cause of action.—Selover v. Isle Harbor Land Co., Minn., 98 N. W. Rep. 344.

154. SPECIFIC PERFORMANCE—Sale of Land.—A contract obligating the vendor to convey the land, on delivery to him of a specified quantity of wheat or its equivalent in money, held, enforceable as mutual, both as to obligation and remedy.—Pederson v. Dibble, N. Dak., 98 N. W. Rep. 411.

155. STIPULATIONS—Setting Aside Report.—Where report of referee is submtted to the court to determine the case on the merits, on error the supreme court will not consider the correctness of the findings of the district court.—Hodges v. Graham, Neb., 98 N. W. Rep. 418.

156. STREET RAILROADS—Rights of Company Under Franchise.—A street railroad company held authorized to connect its line in a village with another line built to the village boundary.—Houghton County St. Ry. Co. v. Common Council of Village of Laurium, Mich., 98 N. W. Rep. 393.

157. SUBROGATION—Rights of Surety on Official Bond.—A surety on the official bond of a clerk of court held entitled to be subrogated to rights against creditors whose claims had been paid by the principal with trust funds.—Fidelity & Deposit Co. v. Jordan, N. Car., 46 S. E. Rep. 496.

158. TAXATION—Equitable Enforcement.—No provision of law being made for enforcement of payment of taxes by railroads, the law contemplates their enforcement by ordinary remedies, one of which is to establish and enforce a lien against property.—Dobbins v. Colorado & S. Ry. Co., Colo., 75 Pac. Rep. 156.

159. TAXATION—Levy of Tax to Satisfy Judgment.—A levy of a tax, under Ann. St. 1903, §§ 10,698, 10,701, with which to satisfy a judgment against a municipality, will not be enforced by mandamus, when in excess of constitutional or statutory limitations.—State v. Royse, Neb., 98 N. W. Rep. 459.

160. TAXATION—Uniformity.—Const. 1890, § 112, providing for the taxation of property within the state, held self-executing, and prevents the legislature from classifying property for taxation, except as therein provided.—Adams v. Kuykendall, Miss., 35 So. Rep. 830.

161. TELEGRAPHS AND TELEPHONES—Evidence as to Damages for Delay in Delivering Message.—In an action for delay in delivering a telegram accepting an offer for the sale of cotton, plaintiff held entitled to introduce a copy of another telegram offering plaintiff an advanced price for the cotton.—Postal Telegraph Cable Co. v. William Rhett & Co., Miss., 35 So. Rep. 829.

162. TELEGRAPHS AND TELEPHONES—Excuses for Delay.—The sender of a telegram, written on a blank of another company than defendant, held bound by the conditions thereon.—Jacob v. Western Union Tel. Co., Mich., 98 N. W. Rep. 402.

163. TRIAL—Contributory Negligence in Action for Injuries to Minor.—In action for injuries to minor servant, error in refusing an instruction on contributory negligence of the plaintiff held not cured by another instruction.—Fries v. American Lead Pencil Co., Cal., 75 Pac. Rep. 164.

164. VENDOR AND PURCHASER—Boundaries.—Where plaintiff purchased lots according to a plat, made by the owner, showing them to extend to the ocean, she was not bound by survey stakes showing that the lots did not extend so far; her attention not being called to such stakes.—Carlyle v. Sloan, Oreg., 75 Pac. Rep. 217.

165. VENDOR AND PURCHASER—Unrecorded Act.—Where the act is unrecorded, the person who buys the property from the ostensible owner in possession under title will acquire a valid title, if he be an innocent third person.—Harrison v. Ottman, La., 35 So. Rep. 844.

166. WAREHOUSEMEN—Storage Charges.—To recover charges for storage of grain, a warehouseman must keep at the same place, subject to delivery on demand, either the grain left for storage or an equal quantity of other grain of the same quality.—McSherry v. Blanchfield, Kan., 75 Pac. Rep. 121.

167. WATERS AND WATER COURSES—Irrigation.—Alteration in ditch by plaintiff held not to manifest an intention to abandon use of water.—Bolter v. Garrett, Oreg., 75 Pac. Rep. 142.

168. WATERS AND WATER COURSES—Prior Appropriator.—One entitled to the use of water held not estopped by seeing another constructing a ditch and making no objection until the diversion is completed.—Bolter v. Garrett, Oreg., 75 Pac. Rep. 142.

169. WATERS AND WATER COURSES—Property in Ice.—Ice formed in a state canal basin, constructed upon and entirely surrounded by state land, belongs to the state.—Green Island Ice Co. v. Norton, 86 N. Y. Supp. 613.

170. WATERS AND WATER COURSES—Riparian Rights to Flow of Stream.—A riparian owner's right to the flow of a stream passing through his land is a part of the land, and entitled to protection.—Cline v. Stock, Neb., 98 N. W. Rep. 454.

171. WILLS—Right of Heir.—A will giving to the wife a life estate, and to her son all property after her death, empowers the son to transfer to his mother and her heirs, forever, the property to become his after the death of the mother.—Coats v. Harris, Idaho, 75 Pac. Rep. 243.

172. WITNESSES—Husband and Wife.—Under Code, § 4606, wife held not competent as a witness against her husband in a prosecution against him for rape committed upon her prior to her marriage.—State v. McKay, Iowa, 98 N. W. Rep. 510.

173. WITNESSES—Impeachment.—Where a prisoner in a county jail testified as to conversations between defendant and a third party, the record of an indictment against him, offered for the purpose of impeachment, was properly excluded.—State v. Ronk, Minn., 98 N. W. Rep. 384.

174. WITNESSES—Physician of Patient Qualifying as Expert.—Under Code, § 4680, relating to privileged communications, held, that a physician who attended a patient may give expert testimony, based on hypothetical questions, as to the cause of injury to his patient.—Crago v. City of Cedar Rapids, Iowa, 98 N. W. Rep. 354.